TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 264~~ 32

LORENZO BULL, CHARLES H. BULL, AND EDWARD J. PARKER, PARTNERS AS L. AND C. H. BULL, PLAINTIFFS IN ERROR,

vs.

THE FIRST NATIONAL BANK OF KASSON, AND A. LA DUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 5, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 284.

LORENZO BULL, CHARLES H. BULL, AND EDWARD J. PARKER, PARTNERS AS L. AND C. H. BULL, PLAINTIFFS IN ERROR,

vs.

THE FIRST NATIONAL BANK OF KASSON, AND A. LA DUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	1¾	2
Complaint	2½	2
Exhibit "A"—Copy of draft, October 15, 1881	3	5
"B"— " "	4	5
Answer of defendant La Due	4	5
Answer of First National Bank of Kasson	6	7
Exhibit "C"—Promissory note of M. Edison, October 5, 1881	9	10
"D"— " " February 15, 1881	9	10
"E"— " " October 27, 1880	9	10
"F"— " " August 1, 1881	9	10
"G"— " " September 7, 1874	10	11
Reply to defendant La Due	10	11
Reply to answer of defendant Bank	12	12
Stipulation waiving jury	13	14
Order on hearing	15	14
Opinion (Judge McCrary)	15	15
Order of continuance	18	17
submission	18	17

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Order granting new trial	18	18
Opinion of Justice Miller	19	18
Order denying oral motion to dismiss for want of jurisdiction and certificate of division of opinion of Judge McCrary and Judge Nelson and judgment for defendant	21	20
Order allowing appeal	23	22
Præcipe for writ of error	23	22
Bond in error	24	23
Clerk's certificate	26	24
Assignment of errors	28	25

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Lorenzo Bull, Charles H. Bull, and Edward J. Parker, partners doing business as L. and C. H. Bull, as plaintiffs, and the First National Bank of Kasson and A. La Due, as defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of January, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth year.

[Seal U. S. Circuit Court Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

1½ UNITED STATES OF AMERICA, *District of Minnesota,* } *ss:*

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is made, with all things concerning the same, are hereby respectfully certified to the Justices of the Supreme Court of the United States of America, within mentioned in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this — of ——, in the year of our Lord one thousand eight hundred and —, and of the Independence of the United States the one hundred and — year.

—— ——,
Clerk U. S. Circuit Court, Dist. of Minnesota.

[Endorsed:] Lorenzo Bull *et al. vs.* First National Bank of Kasson *et al.* Writ of error.

1¾ *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the First National Bank of Kasson and A. La Due:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein Lorenzo Bull, Charles H. Bull, and Edward J. Parker, partners doing business as L. & C. H. Bull, are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rensselaer R. Nelson, district judge of the United States for the district of Minnesota, this 22nd day of January, in the year of our Lord one thousand eight hundred and eighty-four.

R. R. NELSON,
District Judge.

2 [Endorsed:] Ent. C. Law, 342. Citation. L. & C. H. Bull *vs.* First National B'k [of] Kasson *et al.* On Error. Service of the within is admitted at Rochester, Minn., January 23rd, A. D. 1884. C. C. Willson, att'y for def't bank. Jones & Gore, att'ys for def't in error, La Due. Filed Jan'y 28, '84. Oscar B. Hillis, clerk. Lampey, Jones & Warren, att'ys for pl'ffs in error.

2⅓ United States Circuit Court, District of Minnesota.

LORENZO BULL, CHARLES H. BULL, & EDWARD J. PARKER

vs.

THE FIRST NATIONAL BANK OF KASSON, MINNESOTA, and A. LA DUE.

Pleas before the honorable the judges of the circuit court of the United States for the district of Minnesota, of the December term, A. D. 1883, of said court, held in the city of Saint Paul, in said district, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and eighth year.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 4th day of August, A. D. 1882, came the plaintiff- above named, by *his* attorneys and filed in the clerk's office of said court *his* complaint in words and figures as follows, to wit:

United States Circuit Court, District of Minnesota.

LORENZO BULL *et al.*

vs.

THE FIRST NATIONAL BANK OF KASSON, MINNESOTA, and A. LA DUE.

The complaint of said plaintiffs in the above-entitled action against said defendants shows to this court and states:

First. That said plaintiffs are, and for more than one year last have been, partners as and doing business by and under the firm name of L. & C. H. Bull, and each and all of them during all of said time have been, and still are, residents and citizens of the State of Illinois; that said defendant, The First National Bank of Kasson, Minnesota, is, and for more than one year last past has been, a national banking association and corporation, duly incorporated, created, organized, and exising by and under the laws of the United States, and established in the State and district of Minnesota; that said defendant, A. La Due, is, and for more than one year last past has been, a citizen and resident of and in the State of Minnesota; that heretofore, to wit, on the 15th day of October, 1881, at Kasson, in the State of Minnesota where said
2⅔ defendant, The First National Bank of Kasson, Minnesota, then was, ever since has been, and still is, carrying on its banking business; the said defendant, The First National Bank of Kasson, Minnesota, for value received, and in consideration of the sum of five hundred dollars and exchange on New York to it in hand paid, drew, executed, and delivered to said defendant, A. La Due, its certain draft or bill of exchange, dated on said day and directed to the Ninth National Bank of New York City, and which was then, ever since has been, and still is, a national banking association and corporation established and doing a general banking business in the city and State of New York, and created, organized and existing by and under the laws of the United States of America, wherein and whereby said First National Bank of Kasson, Minnesota, ordered and directed said Ninth National Bank of New York City to pay to the order of Mr. A. La Due, one of said defendants, the sum of five hundred dollars in current funds; that thereafter, for value received, the said defendant, A. La Due, in the regular course of business, for a valuable and adequate consideration, indorsed, sold, transferred, and delivered said draft or bill of exchange to one M. Edison, and thereafter the said M. Edison, at Quincy, in the State of Illinois, for value received, in the regular course of business, and for a valuable and adequate consideration, endorsed, sold, transferred, and delivered said draft or bill of exchange to these plaintiffs; that afterwards and on the 27th day of March, A. D. 1882, the said draft or bill of exchange was duly presented to & at said Ninth National Bank of New York City, at its banking-house in New York city, the place of payment thereof, and payment thereof then and there duly demanded of said Ninth National Bank, but

payment thereof was refused and the same has never been paid, nor any part of the same, but the said draft or bill of exchange was then and there protested for non-payment, and notice of said demand, non-payment, and protest thereof duly given to the endorsers thereof and to said defendants, and each of them then and there, whereof the actual cost was one and $\frac{41}{100}$ dollars, by said plaintiffs paid therefor; that a true copy of said drafts and of said indorsements thereon is hereto attached, marked Exhibit "A," and hereby made a part hereof.

Second. For a second and further cause of action herein said plaintiffs allege, aver, and say that heretofore, to wit, on said 15th day of October, 1881, at said Kasson, in said State of Minnesota, where said defendant, The First National Bank of Kasson, Minnesota, then was carrying on its business, as hereinabove set forth, the said defendant, The First National Bank of Kasson, Minnesota, for value received and in consideration of five hundred dollars and exchange on New York, to it then and there in hand paid, drew, executed, and delivered to said defendant, A. La Due, its certain other draft or bill of exchange, dated on said 15th day of October, 1881, on and directed to the Ninth National Bank of New York City, hereinabove referred to, wherein and whereby said First National Bank of Kasson, Minnesota, ordered and directed said Ninth National Bank of
3 New York city to pay to the order of Mr. A. La Due, one of said defendants, the sum of five hundred dollars in current funds; that thereafter, for value received, the said defendant, A. La Due, in the regular course of business, for a valuable and adequate consideration, indorsed, sold, transferred, and delivered said draft or bill of exchange to one M. Edison, and thereafter the said M. Edison, at Quincy, in the State of Illinois, for value received and for a valuable and adequate consideration, in the regular course of business, indorsed, sold, transferred, and delivered said draft or bill of exchange to these plaintiffs; that afterwards and on the 27th day of March, 1882, the said draft or bill of exchange was duly presented to and at said Ninth National Bank of New York City, at its banking-house in New York city, the place of payment thereof, and payment thereof then and there duly demanded of said Ninth National Bank, but payment thereof was refused, and the same has never been paid, nor any part of the same, but the said draft or bill of exchange was then and there protested for non-payment, and notice of said demand, non-payment, and protest thereof duly given to the endorsers thereof and to said defendants and each of them, then and there, whereof the actual cost was one and $\frac{41}{100}$ dollars, paid by said plaintiffs therefor; that a true copy of said draft or bill of exchange and of said indorsements thereon is hereto attached, marked Exhibit "B," and hereby made a part hereof.

Of all which facts said defendants and each of them have had due notice and knowledge.

Wherefore said plaintiffs demand judgment against said defendants and each of them in this action for the sum of one thousand two and $\frac{82}{100}$ dollars, and interest thereon at the of rate seven per cent. per annum from and since March 27, 1882, besides five per

cent. damages on the sum of one thousand dollars and interest since March 27, 1882, besides the costs and disbursements of this action.

LAMPREY, JAMES & WARREN,
Plaintiffs' Attorneys, St. Paul, Minn.

"EXHIBIT A."

(Copy of draft.)

THE FIRST NATIONAL BANK,
$500. KASSON, MINN., *Oct. 15th*, 1881.

Pay to the order of Mr. A. La. Due five hundred dollars in current funds.

No 18956. E. E. FAIRCHILD, *Cashier.*

[Original U. S. internal revenue stamp, 2 cts.]

To Ninth National Bank, New York city.

Indorsed: Pay to the order of M. Edison, Esq. A. La Due. M. Edison.

4 EXHIBIT "B."

(Copy of draft.)

FIRST NATIONAL BANK,
$500. KASSON, MINN, *Oct.* 15, 1881.

Pay to the order of Mr. A. La Due five hundred dollars in current funds.

No. 18754. E. E. FAIRCHILD, *Cashier.*

[Original U. S. internal revenue stamp, 2 cents.]

To Ninth National Bank, New York city.

Indorsed: Pay to the order of M. Edison, Esq. A. La Due. M. Edison.

Verification.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Henry C. James came before me personally and, being duly sworn, doth say that he is one of the attorneys for the plaintiffs in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by said plaintiffs is that they are absent from the State and district of Minnesota where reside their said attorneys; and further saith not.

HENRY C. JAMES.

Subscribed and sworn to before me on this 3rd day of August, A. D. 1882.

[NOTARIAL SEAL.] A. P. WARREN,
Notary Public, Minn.

(Endorsed:) Filed Aug. 4, 1882. H. E. Mann, clerk.

And afterwards, to wit, the 18th day of August, A. D. 1882, the answer of defendant, A. La Due, was filed in this cause in words and figures, as follows:

Answer of A. La Due.

United States Circuit Court, District of Minnesota.

LORENZO BULL *et al.*
vs.
FIRST NATIONAL BANK OF KASSON, MINN., *et al.*

The defendant, Ambrose La Due, for his separate answer to the complaint herein; denies that the said M. Edison in the complaint mentioned indorsed or delivered or otherwise transferred said checks or drafts therein set forth, or either of them, to the plaintiffs, in the regular course of business, or otherwise than as hereinafter stated, and as to what, if any consideration, plaintiffs paid therefor this defendant alleges that he has not sufficient knowledge or information thereof to form a belief. Further answering, this defendant alleges that he purchased each of the checks or drafts in the complaint mentioned of his codefendant in the regular course of business on the day of their date, and paid therefor the sum expressed therein and current exchange on New York, and on the same day paid, endorsed, and transferred the same to said Edison in like manner and for a like sum.

That said Edison kept and held said drafts in his own possession for over five months thereafter, and until March 25th, 1882, at which time he transferred the same to the plaintiffs, they then well knowing said facts.

That about the same time the defendant bank countermanded the order for the payment of the same by the said Ninth National Bank of New York and stopped the payment thereof.

That if the said checks or drafts had been presented by the holder thereof to the said Ninth National Bank in the regular course of business within a reasonable time after they were issued and so transferred by this defendant they would have been paid in full and at sight by it, and that such payment was not so countermanded for more than two months after they were so transferred to said Edison.

Wherefore this defendant demands judgment that he be hence dismissed, with his costs.

JONES & GOVE,
Attorneys for Defendant, A. La Due.

STATE OF MINNESOTA, } ss:
County of Olmsted, }

Richard A. Jones, of said county, being duly sworn, says that he is one of the attorneys of defendant La Due in this action; that the said defendant is absent from the county of Olmsted, where this deponent resides, and that the foregoing answer is true to the best of deponent's knowledge, information, and belief.

R A. JONES.

Subscribed and sworn to before me this 17th day of August, A. D. 1882.

[SEAL.] R. H. GOVE,
Notary Public.

(Endorsed:) Filed August 18, 1882. H. E. Mann, clerk.

6 And afterwards, to wit, on the 23rd day of August, A. D. 1882, the separate answer of the First National Bank of Kasson, Minnesota, was filed in this cause in words and figures following:

Answer of First National Bank of Kasson.

United States Circuit Court, District of Minnesota.

LORENZO BULL, CHARLES H. BULL, and EDWARD J. PARKER
against
THE FIRST NATIONAL BANK OF KASSON, Impleaded with AMBROSE LA DUE.

The defendant, The First National Bank of Kasson, for separate answer herein, alleges that it drew and delivered both the drafts mentioned in the complaint on October 15th, 1881; that on the same day, at Mantorville, in said district, said La Due duly sold, indorsed, and delivered both said drafts to one Marcellus Edison, in the complaint mentioned. It further alleges that said Edison held and owned both said drafts without presentation for acceptance or payment over five months and until the 26th day of March, A. D. 1882, on which last-mentioned day, and not before, he sold, endorsed, and delivered both said drafts to the plaintiffs; that both said drafts were then long past due when so purchased by plaintiffs, and had neither of them been in any manner presented to the drawee for acceptance or payment, nor had acceptance or payment of either of said drafts been at any time prior to said March 26th, 1882, demanded, excused, or waived, nor had notice of non-payment or non-acceptance been prior to said March 26th, 1882, given this defendant or said La Due.

This defendant further alleges that its codefendant was at the date of said drafts the attorney-at-law and agent of said Edison, and acted as such in buying and obtaining said drafts and paid for them with the money of said Edison then in his hands, and as such attorney and agent on the day of the date of said drafts endorsed and delivered them to his said principal, the said Edison; that in said Edison's hands both of said drafts became and were past due and subject to defenses and set-off and said La Due discharged from all liability thereon, and that said plaintiffs took both said drafts as past-due paper, subject to all equities and set-off between this defendant and said Edison.

That said Edison then was and still is insolvent and a fugitive from his creditors and absent from this district, where he had resided prior thereto, and then was and still is an absconding debtor, and has no property in this district or elsewhere.

This defendant further alleges that it had notice on October 16th,

1881, that said Edison was the owner and holder of both said drafts, and that it first had notice that Edison had sold or transferred them, or either of them, on March 29th, A. D. 1882.

7 This defendant further alleges that on October 5th, 1881, at Kasson, Minnesota, said Edison, for value received, made and delivered to this defendant his promissory note in writing, dated that day, in and by which he promised to pay it or order, at its office in said Kasson, ten days thereafter, two hundred dollars, with interest from its date until paid, at the rate of ten per cent. per annum; that this defendant ever since has been and still is the owner and holder of said note; that it fell due on October 18th, 1881; that it has not been paid, or any part thereof, except interest on it, until it fell due; that this defendant so held said note past due and unpaid during February and March, A. D. 1882, while said Edison so held and owned said two drafts past due. A true copy of said note is hereto attached, marked "C," and hereby made a part hereof.

This defendant further alleges that on February 15th, 1881, at Kasson, Minnesota, said Edison, for value received, made and delivered to this defendant his certain other promissory note in writing, dated that day, in and by which he promised to pay it or order, at the office in said Kasson, eight months thereafter, one hundred dollars, with interest from its date until paid at the rate of ten per cent. per annum; that one H. G. Wetherbee, who then was and still is insolvent, is a joint and several maker of said note with said Edison; that this defendant ever since has been and still is the owner and holder of said last-mentioned note; that it fell due on October 18th, 1881; that it has not been paid, or any part thereof, except interest on it until it fell due; that this defendant so held said note past due and unpaid during February and March, A. D. 1882, while said Edison so held and owned said two drafts past due. A true copy of this said note is hereto attached, marked Exhibit "D," and hereby made a part hereof.

This defendant further alleges that on October 27, 1880, at Mantorville, Minnesota, said Edison, for value received, made and delivered to one George B. Arnold his promissory note in writing, dated that day, in and by which he promised to pay said Arnold or order, one year after that date, one hundred and seventy dollars, with interest, as well after as before maturity from date until paid, at ten per cent. per annum; that said Arnold afterwards, and before its maturity, sold and delivered said note, in the due course of business, to this defendant, for a valuable consideration, and this defendant ever since has been and still is the owner and holder of said last-mentioned note; that it fell due on October 30, 1881; that it has not been paid, or any part thereof; that this defendant so held said note past due and unpaid during the months of February and March, 1882, while said Edison held and owned said two drafts. A true copy of this said note is hereto attached, marked "E," and is hereby made a part hereof.

This defendant further alleges that on August 1st, A. D. 1881, at Kasson, Minnesota, said Edison, for value received, made and delivered to the McCormick Harvesting Machine Company his prom-

issory note in writing, dated that day, in and by which he
8 promised to pay it or bearer on or before the first day of November, A. D. 1881, one hundred and forty-five dollars, with interest at seven per cent. per annum from date until paid, at the office of this defendant; that said McCormick Harvesting Machine Company was then and there a corporation; that it afterwards, and before the maturity of said note, sold and delivered it and the same afterwards came to and was purchased, held, and owned by this defendant before its maturity and in the due course of business and for value, and this defendant ever since has been and still is the owner and holder of said last-mentioned note; that it fell due on November 4, 1881; that it has not been paid or any part thereof; that this defendant so held said note past due and unpaid during the months of February and March, A. D. 1882, while said Edison held and owned said two drafts past due. A true copy of this said note is hereto attached, marked "F," and is hereby made a part hereof.

This defendant further alleges that on August 7th, A. D. 1874, at Mantorville, in said district, said Edison, for value received, made and delivered to one Tennis S. Slingerland his promissory note in writing, dated that day, in and by which he promised to pay said Slingerland, or bearer, one month thereafter five hundred and fifty dollars, with interest until paid at the rate of twelve per cent. a year; that defendant paid on said note $66 September 7th, 1875; $200 March 29th, 1877; $30 May 16th, 1877, and $40 December 1st, 1881; that said note is past due; that no more has been paid thereon; that after deducting said payments there remained due on said note $625.54 on December 1st, 1881; that on that day this defendant, for value received, purchased and became the owner and holder of said last-mentioned note and still is the owner and holder thereof; that this defendant so held and owned said note past due and unpaid during the months of February and March, A. D. 1882, while said Edison so held said two drafts past due. A true copy of this said note and indorsements is hereto attached, marked "C," and is hereby made a part hereof.

This defendant further alleges that its said five several claims were each a defense and set-off to the amount thereof respectively to the causes of action stated in the complaint when plaintiffs purchased them, and still are such defense and set-off, and that plaintiff bought both said drafts when past due and subject to this defendant's right and purpose to set off the said five claims above mentioned in the order they are above set forth against the amount found due on said drafts mentioned in the complaint. This defendant alleges that said two drafts are each and both paid, satisfied, and extinguished by reason of the fact aforesaid, and it prays judgment accordingly, and that they be so set off, and that plaintiffs take nothing by this action, and that they pay this defendant's costs and disbursements of this action.

CHAS. C. WILLSON,
Attorney for Defendant Bank.

9 "C."

$200. KASSON, MINN., *Oct. 5th*, 1881.

Ten days after date, for value received, I promise to pay to the First National Bank of Kasson, or order, the sum of two hundred dollars, with interest at the rate of ten (10) per centum per annum after date until paid, without defalcation or discount, payable at the First National Bank of Kasson, Minn.

No. 9729. M. EDISON.

Due 10, 15, '81.
P. O. address, Mantorville.

(Indorsed:) "Int. paid till due."

"D."

($100.) KASSON, MINN., *Feb. 15th*, 1881.

Eight months after date, for value received, I promise to pay to the First National Bank of Kasson, or order, the sum of one hundred dollars, with interest at the rate of ten per cent per annum after date until paid, payable at the First National Bank of Kasson, Minn.

No. 8926. H. G. WETHERBEE.
M. EDISON.

Due 10, 15, 1881.
P. O. address, Dodge Center & Mantorville.

(Endorsed:) "Int. paid till due."

"E."

$170. MANTORVILLE, MINN., *October* 27, 1880.

One year after date I promise to pay George B. Arnold, or order, one hundred and seventy dollars, for value received, with interest, as well after as before maturity, and from date until paid, at ten per annum, interest payable annually.

Number 416. M. EDISON.

P. O. address, Mantorville.

(Endorsed:) For value received, I hereby sell and assign the within note to the First National Bank of Kasson, Minnesota. Geo. B. Arnold.

"F."

$145. KASSON, MINN., *Aug. 1st*, 1881.

On or before the 1st day of November, 1881, for value received, the undersigned promises to pay to the McCormick Harvesting Machine Company, or bearer, at First National Bank [of] Kasson, Minnesota, one hundred and forty-five dollars, with interest at seven per cent. per annum from date until due; ten per cent. per annum thereafter until paid.

M. EDISON.

Post office, Mantorville, Dodge Co., Minn.

10 $550. "G."

One month after date, for value received, I promise to pay Tennis S. Slingerland, or bearer, five hundred and fifty dollars with the interest thereon, as well after as before maturity, and from date until paid, at the rate of twelve per cent. per annum.

M. EDISON.

Dated September 7th, 1874.

Endorsements.

Received one year's interest on the within note to Sept. 7th, 1875, $66. Received, March 29th, 1877, by bank check, two hundred dollars on the within note. Received, May 16th, 1877, thirty dollars on the within note, by one set of harness. $40 to be allowed on this note from Winslow Martin.

Verification by Attorney.

STATE OF MINNESOTA, } *ss:*
County of Olmsted, }

Charles C. Willson, of said county, being duly sworn, says he is attorney for the defendant bank in this action, and that the officers of said bank are all absent from said county, where this deponent resides; that the foregoing answer is true to the best of deponent's knowledge, information, and belief.

CHAS. C. WILLSON.

Subscribed and sworn to before me this 21st day of August, A. D. 1882.

[SEAL.] CHAS. N. CHADBOURN,
Notary Public.

Endorsed: Filed August 23, 1882. H. E. Mann, clerk.

And afterwards, to wit, the following reply to the answer of defendant La Due was filed in this cause in words and figures as follows, to wit:

Reply to Defendant La Due's Answer.

United States Circuit Court, District of Minnesota.

CHARLES H. BULL, LORENZO BULL, and EDWARD J. PARKER, Partners Doing Business as L. & C. H. Bull,

vs.

THE FIRST NATIONAL BANK OF KASSON, MINNESOTA, and A. LA DUE.

11 The reply of said plaintiffs to the answer of said defendant, A. La Due, in the above-entitled action shows to this court and states—

First. Said plaintiffs admit that said defendant La Due purchased each of the checks or drafts in the complaint mentioned of his co-defendant in the regular course of business on the day of their date and paid therefor the sum expressed therein and current exchange.

on New York, and that thereafter said defendant La Due indorsed and transferred the same to the Edison mentioned in said complaint in like manner and for a like sum.

And said plaintiffs say that they are informed and believe that at some time, but when they are not informed, said defendant bank stopped the payment of said checks or drafts.

Further replying herein said plaintiffs deny each and every allegation, averment, matter, and thing in said answer contained, whether as therein stated or otherwise, save as in the complaint herein and herein stated, admitted, or qualified.

Wherefore said plaintiffs demand judgment against said defendant- and each of them herein, as hereinbefore in their complaint herein they have demanded.

LAMPREY, JAMES & WARREN,
Plaintiffs' Attorneys.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Henry C. James came before me personally, and, being duly sworn, doth say he is one of the attorneys for the plaintiffs in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by said plaintiffs, or one of them, is that they are absent from the county of Ramsey, Minnesota, where reside their said attorneys, and further saith not.

HENRY C. JAMES.

Subscribed and sworn to before me on this 6th day of September, A. D. 1882.

[SEAL.] A. P. WARREN,
Notary Public, Minn.

"Endorsed:" Filed Sept. 6th, 1882. H. E. Mann, clerk, by O. J. Reynolds, deputy."

United States Circuit Court, District of Minnesota.

And afterwards, to wit, the following reply to the answer of defendant bank was filed in this cause on the 11th day of September, A. D. 1882, in words and figures as follows, to wit:

12 *Reply to Answer of Defendant Bank.*

United States Circuit Court, District of Minnesota.

LORENZO BULL, CHARLES H. BULL, and EDWARD J. PARKER,
Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF KASSON and A. LA DUE, Defendants.

The reply of said plaintiffs to the answer of said defendant, the First National Bank of Kasson, shows to this court and states—

First. Said plaintiffs deny each and every allegation, averment, matter, and thing, and each and every part and portion thereof, in said answer contained, save as in the complaint herein and herein-

after stated, admitted, or qualified. And said plaintiff admits that the defendant, A. La Due, sold, endorsed, and delivered the drafts in said complaint described to one M. Edison, but as to on what day he did so these plaintiffs have no knowledge or information sufficient to form a belief; and said plaintiffs admit that at the time said drafts were purchased by said plaintiffs neither of them had been presented in any manner to the drawer for acceptance or payment, and that as to whether prior to March 26, 1882, neither acceptance -or payment of either of said drafts had been at any time demanded, excused, or waived, or notice of non-payment or non-acceptance had been prior to said date given either of said defendants, this plaintiff has no knowledge or information sufficient to form a belief.

That as to whether said defendant La Due was, at the date of said drafts, the attorney-at-law or agent of said Edison, or acted as such in buying or obtaining said drafts, or paid for them with the money of said Edison then in his hands, or otherwise, or as attorney or agent for said Edison, on the date of the date of said drafts, or at all endorsed or delivered said drafts to said Edison, save as in the complaint herein stated, these plaintiffs have no knowledge or information sufficient to form a belief, and therefore deny the same and every part and portion thereof.

These plaintiffs, further replying herein, allege, aver, and say that they have no knowledge or information sufficient to form a belief as to all or any of the pretended facts, matters, or allegations in said answer contained, beginning with the first line of fol. 4 and ending with the last line of fol. 11 thereof, and said plaintiffs therefore deny the same and every part and portion thereof.

Wherefore said plaintiffs demand judgment against said defendants, and each of them, in this action, as hereinbefore in their complaint they have demanded.

LAMPREY, JAMES AND WARREN,
Plaintiffs' Attorneys.

13 & 14 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Henry C. James came before me personally, and being duly sworn doth say that he is one of the attorneys for the plaintiffs in the above-entitled action; that the foregoing pleading is true to the best of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by said plaintiffs or one of them is that they are absent from the county of Ramsey, Minnesota, where reside their said attorneys, and further saith not.

HENRY C. JAMES.

Subscribed and sworn to before me on this 9th day of September, A. D. 1882.

[SEAL.]

A. P. WARNER,
Notary Public, Minn.

Endorsed: Filed Sept. 11th, 1882. H. E. Mann, clerk, by O. J. Reynolds, deputy.

And afterwards, to wit, on the 19th day of December, A. D. 1883, the following stipulation waiving jury was filed in this cause in words and figures as follows, to wit:

Stipulation Waiving Jury.

United States Circuit Court, District of Minnesota.

LORENZO BULL, CHARLES H. BULL, and EDWARD J. PARKER

vs.

THE FIRST NATIONAL BANK OF KASSON, MINNESOTA, and A. LA DUE.

It is stipulated and agreed by and between the parties to the above-entitled action that it be tried and determined by the court without the intervention of a jury, all hereby waiving a jury.

Dated December 17th, 1883.

LAMPREY, JAMES AND WARREN,
Plaintiffs' Attorneys.
CHARLES C. WILLSON,
At'ty for Bank.
JONES & GOVE,
Attorneys for Defendant La Due.

Endorsed: Filed Dec. 19th 1883. Oscar B. Hillis, clerk.

15 And afterwards, to wit, on the 15th day of December, A. D 1882, the following further proceedings were had and entered of record in "T. M. E." 646, which proceedings are in words and figures as follows, to wit:

Term Minute Entry.

LORENZO BULL *et al vs.* FIRST NATIONAL BANK OF KASSON *et al.*

Before Judge McCrary.

Trial by jury having been waived by stipulation of the parties in writing, on file herein, and the same coming on to be tried, the plaintiffs appeared by Mess. Lamprey, James & Warren; the defendant bank by Charles C. Willson, Esq., and the defendant La Due by Mess. Jones & Gove.

Plaintiff introduces documentary evidence and rests.

C. C. Willson, Esq., opens the case for defendants.

A. La Due is sworn & examined as a witness for defendant.

T. S. Slingerland is sworn & examined as a witness for defendant.

Defendants offer documentary evidence.

Parties rest and the case is submitted with leave to file briefs.

And afterwards, to wit, on the 4th day of January, A. D. 1883, the following opinion of Judge McCrary was filed in this cause, which opinion is in words and figures as follows, to wit:

Opinion.

Circuit Court [of the] United States, District of Minnesota. January, 1883.

LORENZO BULL *et al.*

vs.

THE FIRST NATIONAL BANK OF KASSON and A. LA DUE.

Jury waived and trial by court.

MCCRARY, *Circuit Judge:*

This is a suit upon certain drafts drawn by the defendant bank in favor of defendant La Due for $500 each, dated October 15, 1881. They are in the usual form of bank drafts; no time of payment is named, but they were payable upon presentation and demand. On the day of their date they were endorsed by defendant La Due and delivered to one M. Edison, who, the next day, left the State of Minnesota, carrying the drafts with him, and leaving numerous debts unpaid and no property out of which they could be collected. The said Edison held the drafts over five months without presenting them for payment, and then sold them to the plaintiffs at Quincy, Illinois.

16 The bank pleads by way of defense a set-off or counter-claim against Edison. The defendant La Due claims that he is discharged as endorser by the long delay before the drafts were presented for payment.

The sufficiency of these defenses depends upon the question whether the paper can be regarded as overdue or dishonored at the time plaintiffs took it.

The general rule undoubtedly is that a draft or check is not due for the purpose of being made the foundation of a suit against the drawer or endorser, or for the purpose of determining questions arising under the statute of limitations, or for other similar purposes until it is presented; but I am of the opinion that in determining a question as to the sufficiency of a defense interposed by the drawer or endorser of such an instrument when sued thereon the paper must be considered as overdue if it has not been presented for payment within a reasonable time. Cases may arise in which courts may find some difficulty in deciding whether presentation has been made within a reasonable time, but the present case presents no such difficulty. A delay of over five months is plainly unreasonable. The holder of the draft is not obliged to proceed by the first conveyance to the place of payment to present it for payment, nor is he bound to send it by the first mail. He may retain it in his possession for a time, and if he is traveling may, for convenience, carry it with him in lieu of money, especially if he intends shortly to be at the place of payment to collect it; but he cannot hold it five months without either going or sending to the drawee for his money, especially where the place of payment can be reached by him in a few days. The law presumes, and the parties to such paper may act upon the presumption, that the draft is drawn in the usual course of

such transactions as a convenient method of transmitting funds from one place to another and that it will be presented to the drawee in due time and will not be held indefinitely by the payee without presentment. Such is the rule by which we are to be governed in determining whether the paper is, in the hands of an endorsee, subject to defenses which were good as against the payee and indorser. In other words, the holder of such paper is bound to use reasonable diligence in forwarding the same according to the ordinary course of business. Edwards on Bills & Notes, 386 *et seq.* Walsh *vs.* Dart, 23 Wis., 23, & cases cited.

A draft payable on demand (and such in legal contemplation are the instruments here sued on) must be presented and payment demanded within a reasonable time, and notice of non-payment given to the endorser in order to hold him. And "the circumstances and considerations which determine the question whether or not a bill or note payable on demand has become overdue so as to let in equitable defenses by the original party or parties against the transferee alike determine the question whether or not the presentment has been made in a reasonable time, so as to change the drawer or endorser. 1 Dan. on Negotiable Inst., sec. 611.

Being clearly of the opinion that the drafts sued on in this case were not presented for payment within a reasonable time, I must hold that the defendant La Due, endorser, is discharged, and
17 that the defendant bank is entitled to offset any valid claim held by it against Edison while the drafts belonged to him. This, for the reason that the statute of Minnesota so provides. The following are the statutory provisions on the subject:

"Chap. 65, sec. 40. If the action is upon a negotiable promissory note or bill of exchange which has been assigned to the plaintiff after it becomes due, a set-off to the amount of the plaintiff's demand may be made of a demand existing against any person who has assigned or transferred such note or bill after it became due if the demand is such as might have been set off against the assignor while the note or bill belonged to him.

"Chap. 66, sec. 27. In the case of an assignment of a thing in action the action by the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due."

Under these provisions the supreme court of Minnesota has held that the rule of set-off is so enlarged as to "enable the defendant to set up any claim against the original party which arose out of the subject-matter of the action, or was acquired by the defendant while the chose in action was in the possession of the original party, or before the defendant had notice that he had assigned it for a valuable consideration."

Martin *vs.* Pillsbury, 23 Minn., 175.

It is our duty to enforce the statute as construed by the supreme court of the State.

Partridge *vs.* Insurance Company, 15 Wall., 573, 580.

The set-off of the bank consists of five promissory notes executed by Edison. As to four of them the evidence is satisfactory that the bank owned them prior to the purchase of the drafts by plaintiffs, and they are clearly entitled to set-off against the plaintiffs. As to the last note, to wit, note dated Sept. 7th, 1874, for $550, due one month after date, I am unable to recall any evidence that it was purchased by the bank prior to the transfer of the drafts to the plaintiffs. As it was purchased after maturity there is no presumption as to the time of the purchase, and the burden is upon defendant to show the actual date and that it was at a time when Edison still held the drafts. As the trial before me was a hurried one, and my minutes of the testimony are not full, it may be that this proof was made and that I did not observe it, or have forgotten it. If defendant desires to do so he may offer further proof upon this point, to which plaintiffs may reply, but if no further evidence is offered the offset as to the other notes will be allowed, and as to this one rejected, and judgment rendered accordingly.

(Endorsed:) Filed Jan. 4th, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy.

18 And afterwards, to wit, on the 15th day of February, A. D. 1883, the following further proceedings were entered of record in this cause in term minutes "E," 737, in words and figures as follows:

Term Minute Entry.

LORENZO BULL *et al*

vs.

THE FIRST NATIONAL BANK OF KASSON *et al.*

And now come the plaintiffs and make a motion for a new trial in this case. Whereupon it is ordered that said cause and the hearing of said motion stand continued until the next term of this court, with leave to the defendants to offer further proofs as to the time of the purchase of the note dated Sept. 7, 1874, for $550, suggested in the opinion of the court on file, and to plaintiffs to rebut the same in such manner and form as his honor Judge McCrary, who heard the case, shall direct, and with leave to the plaintiffs to prepare and present at that time a bill of exceptions or case, as they may be advised.

And afterwards, to wit, on the 11th day of July, A. D. 1883, the following further proceedings were had and entered of record in this cause in T. M. "F," 57, in words and figures as follows, to wit:

Term Minute Entry.

LORENZO BULL *et al. vs.* FIRST NATION BANK OF KASSON *et al.*

This day come the parties herein by their respective attorneys, and the motion for a rehearing coming on to be heard, it is agreed by said attorneys, orally and in open court, that the same be submitted upon briefs; thereupon said motion is submitted and by the court taken under advisement.

And afterwards, to wit, on the 15th day of July, A. D. 1883, the following further proceedings were had and entered of record in this cause in T. M. "F," 76, which said proceedings are in words and figures as follows, to wit:

Term Minute Entry.

LORENZO BULL *et al vs.* THE FIRST NATIONAL BANK OF KASSON.

A motion for a new trial herein having been heretofore duly argued, submitted, and by the court taken under advisement, now the court, being fully advised in the premises, sustains said
19 motion, and it is hereby ordered that a new trial be granted in said cause.

And afterwards, to wit, on the 26th day of July, A. D. 1883, the following opinion of Justice Miller was filed in this cause, which opinion is in words and figures as follows:

Opinion of Justice Miller.

United States Circuit Court, District of Minnesota. June Term, A. D. 1883.

LORENZO BULL *et al.*
vs.
THE FIRST NATIONAL BANK OF KASSON, MINN.

JULY 16, 1883.

MILLER, *Circuit Justice:*

The case of Lorenzo Bull against the First National Bank of Kasson was submitted to me on a motion for a new trial.

I do not much like to have a case that has been tried, especially as this has been tried, without a jury, and by another judge (Judge McCrary), submitted to me to reconsider; but Judge McCrary himself has requested that I should hear this motion, which is one involving a very important question of commercial law, and which will probably grow more and more important.

The case is that a Mr. La Due purchased of the — Bank of Kasson a draft on a New York bank, and on the same day endorsed it to a man by the name of Edison. Edison held it in his possession four or five months, during which time he absconded (perhaps getting out of the way of his creditors). After that lapse of time Edison sold it to the Bulls, who were bankers in Quincy, Illinois. The — Bank of Kasson had in the meantime become possessed of debts due from Edison to it, or perhaps such debts were due it at the time that the draft was drawn in favor of La Due. The bank had the idea that it could set off against this draft the debts it held against Edison, such draft having been in his hands three or four months, and sent word to its correspondent not to pay the draft, although it had deposited with such corresponding bank funds sufficient therefor. When the Bulls sued the — Bank of Kasson set up its debt against Edison as a set-off.

Judge McCrary held that the set-off could be maintained. The

State supreme court of Minnesota, in an opinion which has been handed to me, holds the same thing exactly in regard to another draft of that same series which came into Edison's hands. It is, therefore, with great hesitation and reluctance that I have come to a different conclusion. The foundation of this set-off, in the opinion of Judge McCrary and of the supreme court of the State Minnesota, is that the draft remained in Edison's hands until it became overdue; that he kept it so long without presentation for payment that the same principles attached to it as if it had been presented and dishonored in due time. Undoubtedly, as a matter of fact, it is a question of law and fact; five months' holding of a draft of that time without any good explanation undoubtedly does raise the presumption against the holder of the draft under some circumstances. A draft payable in another State than that where it is drawn is intended to be circulated; and if it appears that it has gone through a sufficient number of hands to justify its detention for a week or month, or even two months, beyond the usual time, that would account for such delay in presentation. In this case, however, the draft was in Edison's hands alone five months, and the only account he can give of it is that he was trying to swindle his creditors, and kept it with a view of hiding it. Such detention, I agree with both the courts I have mentioned, would render it overdue against any endorser who was interested in the matter. The endorser has a legal right that the draft should be presented within a reasonable time; that demand should be made within a reasonable time; that notice should be given to him of the refusal to pay on demand, and if the draft is kept an unreasonable time out of circulation and out of the way of presentation I think that is good defense for the endorser. In other words, the draft may be counted as dishonored. The endorser has a right to say, "Either the draft has been paid or I am released from it."

These two courts, however, hold that the same rule applies with regard to the drawer of the draft, and I am not prepared to say but what, if the drawer of the draft could show that he had been injured by it—if the bank on which he drew had, for instance, failed with his money in its hands—it would be a good defense. If in any way the bank which drew the draft could show—which is not the present defense in this suit—that it was in any way injured by this delay, or if there could be any reasonable presumption that it was injured by such delay, it might be a good defense, and the draft might be held as overdue and dishonored without presentation and demand, even as to the drawer; but if it appears, as is the fact in this case, that the bank did not suffer any injury and could not suffer any injury; that it had the money in the bank on which it drew; that that bank was solvent; that it forbid that bank to pay the money when it was in its hands to pay it with—it presents a case different from that of a bank which has suffered injury by delay in the presentation of its draft upon a correspondent bank. It is the case of a bank selling a bill of exchange drawn on its correspondent bank in the East, and sending word to that bank not to pay the draft because the drawer has learned that during the four or five months the draft has been

out it has come into the hands of one of its debtors, and it therefore claims the right to set off that debt against the draft, although the latter is still negotiable and by its terms payable to order and
21 may yet come into the hands of a dozen people, and be presented where it is required to be presented—where the drawer has funds to pay it.

Now, I do not apply the doctrine of overdue and dishonored paper at least against the drawer under such circumstances. That is all I have to say about it. Undoubtedly the law or statute of set-off in this State applies to a case of that kind if the doctrine of overdue or dishonored paper can be attached to this draft in Edison's hands. I do not, however, think that it does so attach. Therefore I hold that while there is the unquestionable construction of that statute it is not applicable to this case. The question is whether the bank who made this draft and put it into circulation and got the money for it did in fact lose anything by this delay. It had the money there to pay it when it was presented. Can it turn around and say, "We won't pay it because it has been kept out of circulation five months, and during that time it has come into the hands of our debtor?" If it has come into the hands of one it might have passed through the hands of a dozen, and if a dozen it might have passed through the hands of fifty, and the doctrine claimed would be that every one of those debtors had the draft of the bank, and therefore it might be made a set-off in the hands of an innocent purchaser, although it had never been presented for payment and was outstanding and circulating at that time. I do not deem that proper, and therefore I grant a new trial. I do that with reluctance, however, because the granting of a new trial will require another trial, and in that trial Judge Nelson, who concurs with me in these views, and Judge McCrary will sit. They may certify a division to the Supreme Court of the United States upon this important commercial question.

A new trial is therefore granted.

(The last two sentences of the above were very nearly inaudible.)

Endorsed: Filed July 26, 1883. Oscar B. Hillis, clerk, by Fred. P. Barnett, deputy.

And afterwards, to wit, on the 21st day of December, A. D. 1883, the following further proceedings (certificate of division of opinion of judges and judgment for defendant) were had in this cause and entered of record in T. M. "F," 232, in words and figures following:

Certificate of Division of Opinion.

L. & C. H. BULL

vs.

FIRST NATIONAL BANK OF KASSON and A. LA DUE.

The (oral) motion of defendant to dismiss this cause for want of jurisdiction having been heretofore fully argued by counsel,
22 duly submitted, and by the court taken under advisement,

now the court, after due consideration thereof, and being fully advised in the premises, overrules said motion. Thereupon it is is further ordered by the court as follows, to wit:

This case came on for trial at the present term of this court, and a jury was waived according to law by written stipulation. The evidence having been submitted to the court and duly considered, the court finds the following facts, to wit:

1st. On the 15th day of October, A. D. 1881, the defendant bank drew the drafts or bills of exchange sued on, and copies of which are annexed to the complaint as Exhibit-"A" & "B."

2nd. The said drafts or bills of exchange were immediately, after their execution, transferred by endorsement to one M. Edison, at Kasson, Minnesota, who was then largely indebted, and who, on the next day, absconded from Kasson, carrying said drafts with him.

3rd. The said Edison retained possession of said drafts or bills of exchange until March 24th, 1882, when he endorsed and sold them to the plaintiffs for a valuable consideration at Quincy, Illinois, the plaintiffs having no actual notice of any offset against the same.

4th. The plaintiffs thereupon sent said drafts forward, and on March 27th, 1882, they were presented for payment to the drawee, to wit, the Ninth National Bank of New York, and payment was refused, and the drafts protested for non-payment, and notice thereof given the drawer and endorsers.

5th. In the meantime the defendant bank had become the owner of certain claims or demands against the said Edison, which, under the statute of Minnesota, could be legally offset against its liability as drawer of said drafts or bills of exchange in the hands of said Edison, and also in the hands of the said plaintiffs, if they are not protected as innocent purchasers of said paper before maturity and without notice of such offsets.

6th. At the time the said drafts or bills of exchange were presented to the said Ninth National Bank of New York for payment, as well as at the time said drafts or bills of exchange were drawn, the said bank had in its hands money of the drawer sufficient to pay the same.

Upon the foregoing facts the following question of law arose, to wit:

"Whether the said drafts or bills of exchange are to be regarded as overdue and dishonored paper at the time they were presented by the plaintiffs to the said drawee for payment and payment refused, so as to admit the set-off."

Upon which question the judges were divided in opinion, and thereupon, upon motion of the counsel for plaintiffs, and in accordance with the statute in such cases made and provided, it is ordered that the said question be certified for the decision of the Supreme Court of the United States. And the circuit judge being of the opinion that the said question should be answered in the affirmative, it is thereupon ordered and adjudged that the plaintiffs go hence without day and that the defendants have and recover of
23 them their costs in this proceeding, taxed at $——.

Witness our hands this 21st day of December, A. D. 1883.

GEO. W. McCRARY,
Circuit Judge.
R. R. NELSON,
District Judge.

Endorsed: Filed Dec. 21st, 1883. Oscar B. Hillis, clerk.

And afterwards, to wit, on the 22nd day of January, A. D. 1884, the following further proceedings were had and entered of record in this cause in T. M. "F," 273, in words and figures as follows:

Term Minute Entry.

LORENZO BULL *et al.*
vs.
FIRST NATIONAL BANK OF KASSON *et al.*

A division of opinion of the judges of this court having occurred in the above-entitled cause, and the same having been certified to by said judges, and the same being ordered certified to the supreme court, now come the plaintiffs and present to the court an appeal bond in the penal sum of ($500) five hundred dollars and pray for an appeal to the Supreme Court and that said bond act as a supersedeas; and the court, upon examination of said bond, approves the same and grants said appeal. Thereupon a citation is signed and a writ of error issued herein.

And afterwards, to wit, on the said 22nd day of February, A. D. 1884, a *præcipe* for writ of error and return thereof was filed in this cause in words and figures as follows, to wit:

Præcipe for Writ of Error.

United States Circuit Court, District of Minnesota.

LORENZO BULL, CHARLES H. BULL, and EDWARD J. PARKER, Partners Doing Business as L. & C. H. Bull, Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF KASSON and A. LA DUE.

To O. B. Hillis, Esq., clerk of said court:

Please issue a writ of error to the United States Supreme Court, returnable at the next term thereof, and make and lodge in this court a certified copy of said writ, and return said writ, with a report of the proceedings in said action, to said Supreme Court forthwith in above action.

LAMPREY, JAMES & WARREN,
Plaintiffs' Attorneys.

Endorsed: Filed Jan'y 22, 1884. Oscar B. Hillis, clerk.

24 And afterwards, to wit, on the said 22nd day of January, A. D. 1884, the "bond in error" was filed and entered of record in this cause, in words and figures as follows, to wit:

Bond in Error.

United States Circuit Court, District of Minnesota.

LORENZO BULL, CHARLES H. BULL, and EDWARD J. PARKER, Partners Doing Business as L. & C. H. Bull, Plaintiffs in Error,

against

THE FIRST NATIONAL BANK OF KASSON and A. LA DUE, Defendants in Error.

Know all men by these presents that we, Lorenzo Bull, Charles H. Bull, and Edward J. Parker, as principals, and M. M. Darr and Maurice Auerbach, of Saint Paul, Minnesota, and George R. Finch, of said Saint Paul, as sureties, are held and firmly bound unto the above-named The First National Bank of Kasson and A. La Due in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The First National Bank of Kasson and A. La Due, their successors, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 17th day of January, A. D. 1884.

The condition of the above obligation is such that whereas the above-named Lorenzo Bull, Charles H. Bull, and Edward J. Parker, partners doing business as L. & C. H. Bull, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States in and for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Lorenzo Bull, Charles H. Bull, and Edward J. Parker, partners doing business as L. & C. H. Bull, shall prosecute their writ of error to effect, and, if they fail*ed* to make their plea good, shall answer all damages and costs, then the above obligation to be void; otherwise to remain in full force and virtue.

LORENZO BULL, [SEAL.]
By C. H. BULL,
His Attorney-in-Fact.

CHARLES H. BULL. [SEAL.]
EDWARD I. PARKER. [SEAL.]
M. M. DARR. [SEAL.]
MAURICE AUERBACH. [SEAL.]
GEORGE R. FINCH. [SEAL.]

Signed, sealed, and delivered in the presence of—

A. H. MERRICK,
H. W. MANN,
As to Darr, Auerbach, & Finch.

25 STATE OF ILLINOIS, } ss:
County of Adams, }

Edward J. Parker and Charles H. Bull—the latter individually and as attorney-in-fact of Lorenzo Bull—came personally before me on this 17th day of January, A. D. 1884, to me well known to be the same persons of those names named in and who executed the foregoing bond, and acknowledged the same to be their free act and deed, the said Charles H. Bull as the attorney-in-fact of his principal. The said Lorenzo Bull also acknowledged the same to be the free act and deed of said Lorenzo Bull, by him, as said attorney-in-fact.

[NOTARIAL SEAL.] RICHARD M. SMITH,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Ramsey, }

M. M. Darr, Maurice Auerbach, and George R. Finch came personally before me on this 21st day of January A. D. 1884, to me well known to be the same persons of said names named in and who executed the foregoing bond, and each acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] A. H. MERRICK,
Notary Public, Ramsey County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Morris Auerbach, George R. Finch, and M. M. Darr, being first duly sworn, doth say, each for himself, that he is the same person as the surety above named, and is a resident and freeholder of and in the State and district of Minnesota, and worth the sum of $500 above his debts and liabilities, and exclusive of his property exempt from execution.

MAURICE AUERBACH.
GEORGE R. FINCH.
M. M. DARR.

Subscribed and sworn to before me this 21st day of January, A. D. 1884.

[NOTARIAL SEAL.] A. H. MERRICK,
Notary Public, Ramsey County, Minnesota.

Endorsed: I hereby approve the within bond, and find the same good and sufficient security. January 21, 1884. R. R. Nelson, district judge. Filed January 22nd, 1884. Oscar B. Hillis, clerk.

26 UNITED STATES OF AMERICA:

CIRCUIT COURT OF THE UNITED STATES, } ss:
District of Minnesota, }

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that

the foregoing, consisting of 25 pages, numbered consecutively from 1 to 25, inclusive, is a true and complete transcript of the records, pleadings, orders, final judgment, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 19th day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth year.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS, *Clerk.*

27 [Endorsed:] United States circuit court, district of Minnesota. Lorenzo Bull *et al. vs.* First National Bank of Kasson, Minn., and A. La Due. Return to Supreme Court.

28 *Assignment of Errors.*

In the Supreme Court of the United States, of the October Term, A. D. 1884.

LORENZO BULL, CHARLES H. BULL, and EDWARD J. PARKER, Partners Under the Name and Style of L. and C. H. Bull, Plaintiffs in Error,

vs.

THE FIRST NATIONAL BANK OF KASSON *et al.*, Defendants in Error.

And now come the plaintiffs in error in this cause, by William McFadon, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1stly. The circuit court of the United States for the district of Minnesota erred in deciding that the drafts or bills of exchange mentioned in the certificate of division of opinion of the judges of said last-named circuit court, as also in the finding of facts made by said last-named court, were to be regarded as overdue and

29 dishonored paper at the time they were presented by plaintiffs in error to the drawee of the same for payment, so as to admit the set-offs claimed by the defendant in error, "The First National Bank of Kasson."

2ndly. Said last-named circuit court, upon the facts as found by said last-named court, erred in rendering judgment in favor of the defendant in error, "The First National Bank of Kasson."

3dly. Said last-named circuit court erred in holding that plaintiffs in error, in purchasing the drafts or bills of exchange sued on by them in the circuit court last named, were not innocent purchasers of said drafts or bill of exchange before maturity, and without notice of any offsets in favor of said "The First National Bank of Kasson."

30 By reason whereof the said plaintiffs in error pray that said

judgment of the circuit court for said district of Minnesota be reversed, annulled, and for naught held, and that said plaintiffs in error may be restored to all things which they have lost by reason of said judgment.

By WILLIAM McFADON,
Attorney for Plaintiffs in Error.

31 [Endorsed:] Lorenzo Bull *et als.*, pl'ffs in error, *vs.* The First Nat. Bank of Kasson *et al.*, def'd't in error. Assignments of error.

Endorsed on cover: Minnesota C. C. U. S. No. 284. Lorenzo Bull, Charles H. Bull, & Edward J. Parker, partners as L. & C. H. Bull, plaintiffs in error, *vs.* The First National Bank of Kasson and A. La Due. Filed 5th September, 1884.

123-105
123-105

OFFICE SUPREME COURT U.S.
FILED
FEB 3 1887
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

NO. 284.

LORENZO BULL, CHARLES H. BULL, AND EDWARD J. PARKER, PARTNERS AS L. AND C. H. BULL, PLAINTIFFS IN ERROR,

vs.

THE FIRST NATIONAL BANK OF KASSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

WM. McFADON, Attorney for Plaintiffs in Error.

CADOGAN & HATCHER, PRINTERS AND BINDERS, QUINCY, ILLINOIS.

judgment of the circuit court for said district of Minnesota be reversed, annulled, and for naught held, and that said plaintiffs in error may be restored to all things which they have lost by reason of said judgment.

By WILLIAM McFADON,
Attorney for Plaintiffs in Error.

31 [Endorsed:] Lorenzo Bull *et als.*, pl'ffs in error, *vs.* The First Nat. Bank of Kasson *et al.*, def'd't in error. Assignments of error.

Endorsed on cover: Minnesota C. C. U. S. No. 284. Lorenzo Bull, Charles H. Bull, & Edward J. Parker, partners as L. & C. H. Bull, plaintiffs in error, *vs.* The First National Bank of Kasson and A. La Due. Filed 5th September, 1884.

123-105

123-105

FEB 3 1887

JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

NO. 284.

LORENZO BULL, CHARLES H. BULL, AND EDWARD J. PARKER, PARTNERS AS L. AND C. H. BULL, PLAINTIFFS IN ERROR,

vs.

THE FIRST NATIONAL BANK OF KASSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

WM. McFADON, Attorney for Plaintiffs in Error.

CADOGAN & HATCHER, PRINTERS AND BINDERS, QUINCY, ILLINOIS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1886.

NO. 284.

LORENZO BULL, CHARLES H. BULL AND EDWARD J. PARKER, PARTNERS, &c., *Plaintiffs in error.*

vs.

THE FIRST NATIONAL BANK OF KASSON.

STATEMENT OF CASE.

This case comes before this court on a certificate of division of opinion between the Circuit Judge and the District Judge, holding the Circuit Court of the United States for the district of Minnesota, (R. 22, 23).

The facts as found by the Court constitute our statement in this case, (R. 22, 23).

On the 15th day of October, A. D. 1881, The First National Bank of Kasson, Minnesota, drew its two drafts or bills of exchange (R. 22), of which the following are copies (R. 3, 4):

"$500. "THE FIRST NATIONAL BANK,
KASSON, MINN., Oct. 15th, 1881.

"Pay to the order of Mr. A. LaDue, five hundred dollars, in cur-
"rent funds.
"Original U. S Revenue Stamp, 2 cts. No. 18956. E. E. FAIRCHILD, Cashier.
"TO NINTH NATIONAL BANK,
New York City."

"$500. "THE FIRST NATIONAL BANK,
KASSON, MINN., Oct. 15th, 1881.

"Pay to the order of Mr. A. LaDue, five hundred dollars, in cur-
"rent funds.
"Original U. S Revenue Stamp, 2 cts. No. 18754. E. E. FAIRCHILD, Cashier,
"TO NINTH NATIONAL BANK,
New York City."

The said drafts or bills of exchange were, immediately after their execution, transferred by endorsement to one M. Edison, at Kasson, Minnesota, said Edison being then largely indebted, and on the next

day absconding from Kasson and carrying said drafts with him. (R. 22).

The form of the endorsement on each draft was as follows:

"Pay to the order of M. Edison, Esq.

Signed, A. LaDue." (R. 3, 4.)

The said Edison retained possession of said drafts or bills of exchange until March 24th, 1882, when he endorsed and sold them to plaintiffs in error (the plaintiffs below) for a valuable consideration, at Quincy, Illinois, the plaintiffs in error having no actual notice of any offset against the same (R. 22).

The plaintiffs in error thereupon sent said drafts forward, and on March 27th, 1882, they were presented for payment to the drawee—The Ninth National Bank of New York—and payment was refused, and the drafts protested for non-payment, and notice thereof given the drawer and endorsers.

In the meantime the defendant, the drawer bank, had become the owner of certain claims or demands against the said Edison (R. 22), who, it will be remembered, was not the payee of said drafts, but an endorsee thereof from said payee.

The plaintiffs in error sued the drawer of said drafts (The First National Bank of Kasson), and LaDue as endorser thereof, upon the same and each of them (R. 2, 3).

In said suit, the drawer bank set up by way of set off, the claims or demands so acquired by it as last aforesaid against said Edison (R. 6-11), and the defendant, LaDue, set up lapse of time and delay in presentation of said drafts to the drawee as his defense to the action against him as endorser (R. 5).

The Circuit Court, Mr. Judge McCrary holding it, discharged La Due as endorser, upon his defense aforesaid, and allowed the set offs in favor of the drawer bank (R. 18).

The plaintiffs in error moved for a new trial in the Circuit Court, and the motion being heard by Mr. Justice Miller, a new trial was by him granted plaintiffs in error (R. 21).

On the new trial, the cause was heard by Mr. Judge McCrary, the Circuit Judge, and Mr. Judge Nelson, the District Judge, sitting together, and the judges differing in opinion, the certificate of division aforesaid was signed, and judgment rendered against plaintiffs in error for costs (R. 23).

The further facts found by the said Circuit Court, additional to those above mentioned, were:

That said claims, under the statute of Minnesota, could be legally offset against its liability as drawer of said drafts or bills of exchange in the hands of said Edison, and also in the hands of plaintiffs in error, if they are not protected as innocent purchasers of said paper before maturity and without notice of said offsets.

The Circuit Court also expressly found as a fact in the case, that at the time said drafts or bills of exchange were presented to the drawee bank for payment as well as at the time the same were drawn, said drawee bank had in its hands money of the drawer sufficient to pay the same.

The facts being as above found, the following question of law arose on the trial, viz:

Whether the said drafts or bills of exchange are to be regarded as overdue and dishonored paper at the time they were presented by plaintiffs in error to the drawee for payment and payment refused, so as to admit the set off of the claims so as aforesaid acquired by the drawer after having issued the two drafts sued on below (R. 22).

Upon this question the Circuit and District Judges were divided in opinion, and the Circuit Judge being of opinion that it should be answered affirmatively, judgment was rendered against plaintiffs in error for costs.

To reverse this judgment the writ of error is prosecuted in this case.

The opinion of Mr. Justice Miller in granting a new trial in the court below is so convincing that we desire to call the attention of the court to it as it appears in the record (R. 19).

If the question involved in this record be not already settled by judicial decision—if it be now an open one—we hazard little in saying that no question of greater importance to the commercial world than the one now presented to the court for adjudication, remains unsettled.

The question for adjudication then in this case is this:

May a bank, having issued its draft, and having suffered no injury by reason of delay, as against the endorsee or transferee of its own draft, raise the question that such draft was not presented to the drawee thereof in a reasonable time, and that for that reason the draft became overdue and dishonored before such presentation so as to admit a set off of the kind claimed in this case?

We feel confident that the commercial world does not understand the law to be so. We furthermore feel confident that such is not the law.

The question in this case is one of set off, and the inquiry before us is this: Is a cashier's draft, drawn by a bank in one state upon a correspondent bank in another state, overdue and dishonored, for the purpose of letting in a defense of set off in favor of a drawer or antecedent endorser when such drawer or endorser is sued by one who has purchased such draft, at any time short of its actual presentation to the drawee thereof and payment refused by the drawee, the drawee having remained solvent all the time.

To hold that a draft is overdue under the facts of this case, before presentation to the drawee, is to introduce an element of uncertainty into the law of this class of commercial paper, that must impair its utility as a part of the circulating medium of the country at large. It is to require each holder through whose hands such draft passes to determine for himself and at his peril, whether it has not already been issued too long a time when he takes it. Each holder thereof must determine the question of reasonable time for himself, with the knowledge that a wrong decision will let in defences on the part of all antecedent parties to the paper, and consequently expose him to the loss of all he pays for it.

The purchaser of a draft in the commercial world, is willing to take it on the strength of the solvency of the drawer and drawee; but the

position contended for by our opponents introduces an element of uncertainty into the law of this class of commercial paper, against which no foresight can provide. That element is the question of what is a reasonable time for the circulation of such paper, and if the question be one for a jury, as must often be the case if the inquiry is possible at all, the further question of how a jury will decide upon the question.

As held by Mr. Justice Miller in granting the new trial below, we say that the doctrine of overdue or dishonored paper has no application in the case.

WM. McFADON,

Attorney for Plaintiffs in Error.

SPECIFICATION OF ERRORS.

The plaintiffs in error in this cause, by William McFadon, their attorney, come and say that in the record and proceedings aforesaid there is manifest error in this, to-wit:

Firstly. The Circuit Court of the United States for the District of Minnesota erred in deciding that the drafts or bills of exchange mentioned in the certificate of the division of opinion of the judges of said last named Circuit Court, as also in the finding of facts made by said last named court, were to be regarded as overdue and dishonored paper at the time they were presented by plaintiffs in error to the drawee of the same for payment, so as to admit the set off claimed by the defendant in error, "The First National Bank of Kasson."

Secondly. Said last named circuit court, upon the facts as found by said last named court, erred in rendering judgment in favor of the defendant in error, "The First National Bank of Kasson."

Thirdly. Said last named circuit court erred in holding that plaintiffs in error, in purchasing the drafts or bills of exchange sued on by them in the circuit court last named, were not innocent purchasers of said drafts or bills of exchange before maturity and without notice of any offsets in favor of said "The First National Bank of Kasson."

By reason whhereof the said Lorenzo Bull, Charles H. Bull and Edward J. Parker, partners as aforesaid, pray that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that they may be restored to all things which they have lost by means of said judgment.

WM. McFADON,
Attorney for Plaintiffs in Error.

BRIEF.

I.

A bank cashier's check of the kind sued on in this case is not a bill of exchange at all, but is a bank check and subject to the laws governing bank checks.

Harrison vs. Wright, 100 Inda., 515.

Planters' Bank vs. Keesel, 7 Heisk (Tenn.), 200.

Planters' Bank vs. Merritt, 7 Heisk (Tenn.), 198.

Lester & Co. vs. Given, Jones & Co., 8 Bush, 357.

First National Bank of Cincinnati vs. Coates, 3 McCrary, 9.

Rosenthal vs. Mastin Bank, 17 Blatch., 318.

2 Dan'l on Neg. Inst., § 1567.

II.

Being bank checks, the drawer bank is not discharged by any length of delay in presentment, at least not unless said drawer can show actual loss or injury to himself by reason of such delay (as for example, by the failure of the drawee in the interval), and then the discharge would only be *pro tanto*.

Morse on Banking, 2nd Ed., pp. 260, 281.

Merchants' Bank vs. State Bank, 10 Wall., 647.

Robinson vs. Hawksford, 9 Ad. and El., N. S., 52.

Cogswell vs. Rockingham Savings Bank, 59 N. H., 43.

Stewart vs. Smith, 17 Ohio St., 85.

Murray vs. Judah, 6 Cowan, 490.

Little vs. Phoenix Bank, 2 Hill, 425.

2 Dan'l on Neg. Inst., § 1632.

III.

a. By the law governing bank checks, in the strict sense of the word (and we insist that as against a right of set off, the word should receive its strictest construction), a bank check is never overdue and dishonored till presentment thereof has been made to the drawee for payment, and payment thereof been refused by the drawee.

Merchants' Bank vs. State Bank, 10 Wall, 647.

Story on Prom. Notes, 3d Ed., § 491.

Lester vs. Given, Jones & Co., 8 Bush, 360.

Morse on Banking, 2d Ed., p. 283.

Chitty on Bills, 7th Am. Ed., p. 322.

Murray vs. Judah, 6 Cowan, 489.

Strong vs. King, 38 Ill., 18.

b. The general rule of law is that before the drawer of a check can be sued by the holder, the latter must allege and prove a demand on the drawee for payment and a refusal by him to pay.

Murray vs. Judah, 6 Cowan, 490.

2 Dan'l on Neg. Inst., § 1586.

Morse ou Banking, p. 284.

Tryon vs. Oxley, 3 Iowa, 289.

And this is but another ground for holding that as to the drawer, the bank drafts sued on were not due until presentment had been made to the drawee for payment and payment thereof had been refused by such drawee.

The rule then being that the drawer can not be sued upon a bank check or draft until after presentation of the same to the drawee and a refusal of payment by him—how can such draft be said to be due as to the drawer, before presentation to the drawee has taken place?

c. But the rule being as last stated, the legal effect of a bank check or draft, such as is before the court in this case, is as though a clause were incorporated therein to the effect that the drawer should be liable upon the same only upon its presentation to the drawee and a refusal by him to pay.

The legal effect of the instrument then requiring presentation to the drawee—until such presentation has been made—the instrument as to the drawer is not due for set off until such presentation shall have been first made.

McGough vs. Jamison, 107 Pa. St., 342.

Shute vs. Pacific Nat. Bank, 136 Mass., 488.

Munger vs. Albany City Bank, 85 N. Y., 580.

Bellows Falls Bank vs. Rutland County Bank, 40 Vt., 377.

IV.

a. The doctrine of presentation of a check to the drawee within a reasonable time is one governing between endorser and endorsee when the question is as to the liability of the endorsee; but as between the holder of such check and the drawer, this doctrine has no application where the drawee has remained solvent and the drawer

has lost nothing by the delay, the reason being that the drawer is treated as the principal debtor.

Murray vs. Judah, 6 Cowan, 490.

Little vs. Phoenix Bank, 2 Hill, 425.

Morse on Banking, pages 260, 281.

Bigelow on Bills and Notes, p. 116 and cases cited.

Stewart vs. Smith, 17 O. S., 85.

b. But if such doctrine as is last mentioned ever did obtain between the drawer and holder of a bank check or draft of the kind sued on, it never applies—where, as is the case in hand, the check or draft is a good one, the rule being that age short of the limitation period can not invalidate a good check or draft.

2 Dan'l on Neg. Inst., § 1632.

V.

1

But even if a bank draft became overdue for the purposes of allowing set offs against it, it not presented to the drawee within a reasonable time, it does not follow that the delay in this case was unreasonable.

The question of what is a reasonable time for presentment to the drawee is dependent upon the circumstances of each case.

Chartered Mercantile Bank of India vs. Dickson, 3 L. R. P. C., 574, where it was held that a note payable on demand, dated Feb. 16, 1864, being intended by the makers as a continuing security—and presentment for payment by them not being contemplated at any immediate or specific date, a delay in presentment till Dec. 14th, 1864, was not deemed unreasonable.

2

And in determining what is a reasonable time, regard will always be had to the character of the instrument, and as to bank drafts issued by banks, which derive a profit from the sale of the draft as also from the use of the money received for a draft issued by them, the ordinary rule as to reasonable time does not obtain.

Story on Bills, § 472.

Bayley on Bills, 5th Ed., ch. 7, § 1, p. 236.

Chitty on Bills, 8th Ed., chap. 9, p. 414.

National Newark Banking Co. vs. Second Nat. Bank of Erie, 63 Pa. St., 406.

Nutting vs. Burked, 48 Mich., 245.

Montelius vs. Charles, 76 Ill., 307.

Robinson vs. Ames, 20 John, 152, 153.

Nichols vs. Blackmore, 27 Tex., 586.

Jordan vs. Wheeler, 20 Tex., 698.

3

Dealing as we are with bank drafts, there was no such delay in presentation in this case as was unreasonable.

Laws vs. Rand, (3 C. B. N. S.) 91 E. C. L., 447.

Robinson vs. Hawksford, 9 Ad. and El. U. S. (58 E. C. L.) p. 51.

Mullick vs. Radakisser, 28 Eng. L. and Eq., 28.

Rothschild vs. Comer, 9 B. and C., 388.

Sandford vs. Mickles, 4 John., 225.

Story on Prom. Notes, § 491.

Stewart vs. Smith, 17 O. S., 85.

VI.

Statutes authorizing set off, of the kind existing in Minnesota, are founded upon the principle that a person who takes an overdue note takes it subject to all equities between the original parties. Such statutes are to receive a reasonable construction, and one in harmony with the ordinary understanding of the community, and surely the commercial world does not understand that bank drafts are due till presented to the drawee.

Schute vs. Pacific Nat. Bank, 136 Mass., 487.

Moreover, bank drafts constitute a part of the circulating medium of the country, and no construction should be given to any statutes of Minnesota, authorizing set offs, which would impair the value of bank drafts as such circulating medium.

Merchants' Bank vs. State Bank, 10 Wall., 648.

People's Bank vs. Wilksbarre, 103 Pa. St., 314.

To include bank drafts in the statutes of Minnesota, authorizing set offs, and to allow the set offs of the defendant bank in this case, would be to give a construction to such statutes which would impair and destroy the use of bank drafts as a part of the circulating medium of the land, and in view of such consequences, that construction will not be given to said statutes.

Schute vs. Pacific Nat. Bank, 136 Mass., 487.

Merchants' Bank vs. State Bank, 10 Wall., 648.

People's Bank vs. Wilksbarre, 103 Pa. St., 314.

VII.

It is sought to deduce an argument that the drafts in question were overdue when sold to the plaintiffs in error from the decisions upon promissory notes payable on demand. But there is an important distinction between promissory notes payable on demand and such drafts, in several particulars, and among others these:

1stly. Suit may be brought upon a promissory note payable on demand at once and without demand (see Shute vs. Pacific National Bank, 136 Mass., 488 cases cited) while as we have seen, the drawer of a draft can not be successfully sued without avering and proving a demand for payment upon the drawee.

2ndly. The statute of limitations runs against such promissory note from its date, while as on a check drawn upon a bank in which as in the case at bar, the drawee has funds, the statute of limitations only begins to run from the time of presentation for payment to the drawee and payment by him refused.

Wood on Limitations, Edition 1883, Sec. 140.

Shute vs. Pacific Nat. Bank. 136 Mass., 488 and cases.

A check is only due without presentment and demand when the drawer drawing it has no funds with the drawee. In such case and such case only, does the statute of limitations run against a check from its date.

Wood on Limit, (Edition 1883, Sec. 140 and note 6 and cases cited.)

The differences between a promissory note payable on demand and a check are so great, that no argument can be deduced from the former applicable to the case in hand.

VIII.

1.

But the drawer of a draft, by the issue thereof, ought to be held to be estopped from impairing by any act of his own, the value of such draft in the hands of any subsequent holder thereof.

Mandeville vs. Union Bank of Georgetown, 9 Cranch 9.

Emanuel vs. Atwood, 6 Porter, (Ala.) 384.

2.

This result should follow all the more conclusively from the fact that *as to the drawer*, having funds in the hands of the drawee, a draft is in some decisions, at least in equity, held to be an equitable assignment of so much money of the drawers in the hands of the drawee. In such view of the case, the drawee having made an assignment of funds, complete in itself, to the holder of the draft, such holder's right to such fund so assigned ought not to be defeated by any claim of the drawer of the kind existing in the case at bar.

Parsons on Merc. Law, 90.

German Saving Inst. vs. Adoe 8 Fed. Rep., 109.

First Nat. Bank vs. Coates 8 Fed. Rep., 540.

2 Dan'l on Neg., Ins. § 1643.

Roberts vs. Austin, 26 Iowa, 327.

WM. McFADON,
Attorney for Plaintiffs in Error.

ARGUMENT.

The finding of facts shows that the defendant bank on October 15th 1881, drew the two drafts on which plaintiffs in error sued below.

The same drafts were immediately after their execution, transferred to one M. Edison, of Kasson, Minnesota, who on the next day, absconded from Kasson, carrying said drafts with him.

On March 24th, 1882, Edson, who had retained possession of said drafts, till then, endorsed and sold said drafts to plaintiffs in error at Quincy, Illinois, for a valuable consideration, they having no actual notice of any offsets against the same.

Plaintiffs in error sent the drafts forward to the drawee in New York, and on March 27th, 1882, on presentation made to the drawee, the drawee refused payment of said drafts and notice of non-payment was given to the drawee and endorsers.

The drafts were in the usual form of bank drafts. The plaintiffs in error sued the drawer and La Due as endorser. As to LaDue, the certificate of division leaves no question for consideration open. The question before this Court, is as to the liability of the drawer of the drafts sued on.

The drawer seeks to render valueless its own paper in the hands of an innocent holder and purchaser for value, and if the decision of the Circuit Court as rendered, shall stand—it has succeeded in so doing.

The drawer says to the plaintiffs in error: it is true you purchased the drafts sued on before any dishonor therof, and before they had been presented to the drawee for payment, but it takes only a certain number of days for a draft to go from Kasson, the place of issue of the drafts, to New York, their destination. When you purchased said drafts, more than that certain number of days had intervened since the date of their issue without presentation to the drawee, and therefore the drafts were overdue when you bought them. I, the drawer, claim to defeat my own paper in your hands by setting up—what? Not any equities arising out of the transaction in which these drafts were issued between myself and the payee of the drafts, for there were no such; not any claim of set off held by me against such payee, or against you as plaintiffs in this suit, but by setting up a claim which I have against some intermediate endorser—some third person in no wise connected with you or your suit.

Can such a defense by the drawer succeed is therefore the question to be determined in this case and the result of the decision to be rendered herein is of the utmost consequence to the business interests of the country.

Bank drafts, such as those on which the suit of plaintiffs in error is based, circulate from hand to hand, and by means of them no inconsiderable portion of the business transactions of the country are done, concluded and discharged. In any case, but especially in these

days of national banks, they circulate in the business community largely on the credit of the drawer and the drawee. Once let it be known that such a defense as that urged in this case is possible under the commercial law, and that the drawer of a draft, though suffering no damage by delay, can defeat his own draft in the hands of any holder, by springing upon him the question of its non-presentation within a reasonable time, and the value of drafts to the commercial world will have been seriously impaired by judicial decision. When such shall be declared to be the law of the land, then will a serious limitation have been imposed by Courts upon the use of drafts as a part of the circulating medium of the country, and the business of the country have been seriously inconvenienced thereby.

Upon such view of the law, drafts cannot circulate at all. The danger of a successful defense is increased every time a new holder intervenes and arrests it on its way to its final destination. If to such danger be superadded the certainty that if any holder of such draft makes a mistake in his calculation as to whether such draft has been out a reasonable time or not, the penalty he will have to pay for any mistake will be the admission, by way of set off, of all claims held by the drawer against any and all the different endorsers of such draft, we may rest certain that drafts will no longer be found in, and constituting a part of, the circulating medium of the country as now.

The importance of the questions involved, in their effect upon the business interests of the country, demand their careful conisderation.

I.

The first inquiry is, what are the Instruments sued on. We insist that drafts of the kind sued on, are nothing but bank checks and governed by the law of checks.

A corporation of a state having money on deposit in a bank of the same state, draws against such deposit. The instrument by which it does this is a bank check.

A manufacturing corporation of a Western State deposits in a bank in New York. The instrument by which the corporation draws against such deposit is still a bank check.

Now if the corporation last mentioned, instead of being a manufacturing, should be a banking corporation, would not the instrument by which its deposits were drawn, be still a bank check? We think so, and believe that the authorities so determine.

In Harrison vs. Wright, 100 Inda., 515, the Supreme Court of Indiana decides after a lengthy review of authorities that a cashier's check, drawn on a bank in another state, on no particular fund is not a bill of exchange but is a bank check, and governed by the laws of bank checks.

In First National Bank vs. Coates, 8 Fed. Rep. p. 540, the opinion of Mr. Justice Miller holds that instruments substantially identical in form with those sued on, are bank checks.

In 2 Dan. on Negotiable Inst., § 1,567, it is said, "A draft drawn in one state on a bank in another, is nevertheless a check; and in point of fact checks are very much used in the United States in transmitting money from one state to another."

In Lester & Co., vs. Given, Jones & Co., 8 Bush. 358, the instrument sued on was as follows:

"No. 1,122, $220.

"EDDYVILLE, KY., April 1, 1867.

"In current funds pay to the order of James Lester & Co., two "hundred and twenty dollars, value received, and charge same to account of

"R. L. COBB & SONS.

"To Given, Jones & Co., 33 Broad street, New York.

The Court after analyzing carefully the difference between a bank check and bill, held the above instrument to be a bank check.

In 2 Dan. on Neg. Inst. § 1,572, it is said that the touchstone by which a check is tested *is that a check is payable instantly on demand.* Bank drafts of the kind sued on, certainly answer this distinction, for every holder of them expects payment of them by the drawee, on presentation.

Having precise adjudications in the citations just quoted from, that the instruments sued on are bank checks, we forbear to make further citations from authorities and satisfy ourselves by referring to the other authorities, cited in our brief under Point I.

II.

Having shown that the instruments sued on were bank checks, the law governing such checks becomes at once applicable thereto, and by the law of bank checks we insist that a bank check is not to be deemed overdue for the purposes of admitting a set off, until it has been presented to the drawee for payment and payment has been refused by him.

Before proceeding with citations to prove this point, let us briefly inquire as to what the obligations incurred by the drawer of a bank check, and the payee or subsequent holder thereof, are each to the other. In the case of a check (unlike in the case of a bill of exchange) the drawer is the principal debtor (2 Danl. on Neg. Inst. § 1,587). He undertakes with the payee and every subsequent holder of such check that the drawee shall pay the same on presentment and that in default of his so doing, he, the drawer will pay the same. The law places the payee and each of the subsequent holders of such check in a position as though they had undertaken with the drawer to mature the check within a reasonable time—that is to present it to the drawee for payment within a reasonable time. In the event of the failure of the payee or such subsequent holder to mature the check within a reasonable time, he is liable to make good the damages, if any, to the drawer, resulting from his failure to keep his agreement in that regard, and if the holder shall sue the drawer on such check,

the drawer may recoup by set off damages he has sustained by reason of such failure on the part of the payee or after holder of such check. The effiect of this so to speak, cross obligation is that the drawer of a check is not discharged from liability (as is the drawer of a bill) by laches in presenting it to the drawer for payment. He is only discharged when by such laches, he has suffered injury and then only to the extent of such injury (2 Dan. on Neg. Inst. §1,587).

When a draft matures or becomes overdue is then one thing. What the measure of the liability of the drawer is, after it has matured, and how much he may have to pay in discharge of that liability is quite another thing. It is with the former of the questions we are now concerned, and we assert that a bank check is not due till it has been presented to the drawee for payment, and that it is not overdue till it has been so presented and payment has been refused by the drawee—that at least such is the law when the question under discussion is, as in this case, one concerning set off.

III.

a.

A bank check is not due till presented for payment to the drawee, we assert.

In Merchants Bank vs. State Bank, 10 Wall. 647, the Supreme Court of the United States says:

"Bank checks are not inland bills of exchange, but have many of "the properties of such commercial paper, and many of the rules of "the law merchant are applicable to both. * * * The "chief points of difference are that a check is always drawn on a "bank or banker. No days of grace are allowed. The drawer is not "discharged by the laches of the holder in presentment for payment "unless he can show that he has sustained some injury by the default. "*It is not due till payment is demanded,* and the statute of limitations "runs only from that time."

In Chitty on bills, 7th Am. Ed., p. 322, it is said:

"It was once thought that a check or draft on a banker is not ne-"gotiable generally, but only so within the bills of mortality. But "it is now settled that they are as negotiable as bills of exchange, "but strictly speaking *they are not due before* payment is demanded, in "which respect they differ from bills of exchange, or promissory "notes payable on a particular day."

In § 491 Story on Prom. Notes, 3d Ed., it is said:

"The differences in point of law between checks and bills of ex-"change, or at least those of the ordinary form and in common use, will "be fully seen and illustrated by a few considerations. In the first "place it is a well known rule of law that a bill of exchange or a "promissory note, taken after the day of payment, or as the common "phrase is, when it is overdue subjects the holder to all the equities "attaching to it in the hands of the party from whom he receives it.

"But this rule does not apply to a check; for it is not to be treated as "overdue, although it is taken by the holder some days after its date "and is payable on demand. On the contrary, the holder in such a "case, takes it subject to no equities, of which he has not at the time "notice; for a check is not to be treated as overdue, merely because "it has not been presented as early as it might be, or as a bill of ex- "change is required to be to charge the drawer, or endorser, or "transferrer. One reason for this seems to be that, strictly speaking "a check is not due until it is demanded, and therefore it is not over- "due until it has been presented for payment and payment refused."

In Strong vs. King, 38 Ill. 18, it is said a check matures on presentment.

If we seek for reasons for the difference between the effect of the omisson of diligence in presentment upon the drawer of a check and the drawer of a bill of exchange, it is to be found in the fact that the drawer of a check is the principal debtor—in the case of a bill of exchange he is not, but his liability is secondary.

1 Par. on Notes and Bills, p. 54.

Morrisons vs. Bailey, 5 O. S. 18.

In Lester vs. Given, Jones & Co., 8 Bush. 360, the court in distinguishing between checks and bills, points out as one of the differences between them that a check "is never treated as overdue being "payable on presentment or demand."

In Morse on Banking, p. 283 (2d Ed.), it is said:

"Some authorities in discussing when a taker of an old check could "be held to take it, like other stale or overdue paper, subject to the "same equities to which it is liable in the hands of the transferrer, go "so far as to say that a check is never, until outlawed by lapse of "time, to be considered as overdue for the purpose of bringing it "within the operation of this rule. They say that in fact a check is "not really due until it is demanded; therefore it is not overdue "until it has been presented and dishonored."

In some of the foregoing authorities we find it stated that a check is not due till presentment; in others, that such check is not *strictly* due until presentment. In dealing with the question of the right of set off as we are doing, we insist that there is nothing meritorious about a claim of set off as against the plaintiff's demand.

b.

In Murray v. Judah, 6 Cowan 489, speaking of a demand upon the drawee for payment, the court says:

"That such demand was necessary to entitle the plaintiffs the re- "cover from the drawer is well established. * * As a general "rule, therefore, a check is not due from the drawer until payment "has been demanded from the drawee and refused by him."

The above rule is undoubtedly true, and the only exceptions to it are where the drawer has drawn a draft without funds in the hands of a drawee, or has stopped payment of a draft, or in a few like cases, in which case the drawer is not entitled to have a demand made of the drawee, but may be sued at once upon the paper.

The decision from which we have last cited is supported by others in our brief under Point II, and expresses an undisputed principle of law, that the drawer cannot be sued by the holder of a bank check until he has made a demand for payment of the drawee and payment has been refused by him. What is this but another mode of stating that a bank check is not due as to the drawer till after presentment is made to the drawee for payment and a refusal to pay by him.

c.

Upon the authorities heretofore cited, we contend that the legal effect of the contract between the drawer of a bank check and any subsequent holder thereof implied by law, is that the drawer shall be liable only upon presentation of the bank draft to the drawee for for payment, and a refusal of payment by him. In this view of the case, the decision next cited becomes important and parallel, although rendered in the case of and upon a certiffcate of deposit.

In Shute vs. Paciffc Nat. Bank, 136 Mass., 488, it was decided as against a right of set off, that a certificate of deposit was not due until a demand had been made and the certificate returned or tendered. It is true the clause requiring the presentation was in the certificate itself. In other words it was expressed in the contract that the money should be payable on presentation of the certificate. In the case of the drawer of a draft, we have seen the same provision is implied by law. Why then should the principles of the decision first cited not be applied to the case in hand and be decisive as to the right of set off?

In Morse on Banking, 2nd. Ed., p. 64, it is said that certificates of deposits substantially resemble promissory notes, and courts are inclined to regard them as such. This being the case, nevertheless when the question is—is the certificate overdue, so as to admit of set off, the case last cited expressly rules, that they are not promissory notes for the porposes of set off.

The last case shows how careful courts are to render no decisions which shall impair the usefulness of any thing entering into the circulating medium of the country.

Other cases holding that certificates of deposits are not due till presented, are,

McGough vs. Jamison, 107 Pa., St. 342.

Bellows Falls Bank vs. Rutland County Bank, 40, Vt., 377.

Munger vs. Albany City Bank, 85 N. Y., 580.

In the decisions last cited, we think we are supported in our claim that the drafts sued on were not due till presented to the drawee.

IV.

Our next position is that the doctrine of presentation of a check to the drawee within a reasonable time, is one governing between endorser and endorsee; that as between the holder of such check and the drawee, this doctrine has no application if the drawer has remained solvent, and the drawer has lost nothing by delay, the distinguishing reason being that the drawer is the principal debtor.

See authorities under point IV. of our brief and those already cited.

If, however, that doctrine can govern between the drawer and holder of such checks, such is never the case where the check is a good one with no equities arising out of its issue in favor of the drawer, as is true of the drafts sued on below.

In 2 Dan'l on Neg. Inst., § 1832, it is said: "That age can not invalidate a good check unless the limitation period has applied, and that even if a check be dishonored when transferred, the drawer is yet liable unless he has suffered loss.

V.

But if a bank draft can be regarded as overdue so as to admit a set off, before actual presentment to the drawee, it does not follow that the delay in this case was unreasonable.

The question what is a reasonable time for such presentment is dependent upon the circumstances of each case.

See chartered Mercantile Bank vs. Dickson, 3 L. R. P. C. 574.

In this last case a delay in presentment of 10 months of a note payable on demand was held not unreasonable.

In determining what is a reasonable time, regard will be had to the nature of the instrument under consideration.

A widely different and much more liberal rule seems to exist in the case of bank drafts issued by banks as a source of profit, which also derive a benefit from the use of the money paid for such drafts, to the issuing bank.

It may even be said in this connection that the decisions upon ordinary bank checks do not govern in the case of bank drafts.

In Fegly v. McDonald, 89 Penna. St., p. 130, it is said, speaking of a check by an individual on his banker:

"A check is generally designed for immediate payment and not for "circulation. It is the duty of the holder to present it for payment "as soon as he reasonably may, and if he does not, he keeps it at his "own risk."

In 1 Pars. on Notes and Bills, p. 272, the author says that the person paying out a check may be supposed to deliver it with the idea that it will be at once converted into money.

In 2 Pars. on Notes and Bills, p. 79, the view that checks are not intended for circulation is advanced.

The conclusion of the cases is that checks of the kind last mentioned are not intended for and are not rightfully used for purposes of circulation, and the question of what is a reasonable time is one thing in such a class of cases, but becomes quite another in the case of a bank draft of the kind sued on.

In Story on Bills, § 472 (and it will be remembered the writer is speaking of bills of exchange, where the rule is much stricter than in bank checks), the writer says:

"The more difficult and embarrassing question is to say within "what time presentment should be made, where the bill is endorsed "and put in circulation by the payee. If he keeps it in his own "hands several days before he puts it in circulation, the drawer will "be thereby discharged from all liability if the drawee in the mean-"time fails. But suppose that the payee endorses the bill in blank, "and puts it in circulation on the same day on which he receives it, "or on the next day, and the endorsee and other subsequent holders "each hold it but for a day and circulate it from hand to hand to "other holders without any one retaining it exceeding one day; the "question may then arise, whether the drawer would be held liable "on the bill so long as it has been thus kept in free circulation? Or "whether the payment must be deemed within the period limited to "the payee. It is difficult in the present state of the law to answer "this question in any manner which is entirely satisfactory. A dis-"tinction has been taken between cases where such bills are drawn "by private persons, having no such reference to profits or means of "livelihood, but merely for their own accommodation or that of the "payee. In the former case it has been said that the banker or other "person is understood to sanction both the circulation and non-pre-"sentment by his course of business and by the advantages of credit "which he thus obtains from such circulation and non-presentment "of the bill, and therefore it is difficult to say what length of time, "consistent with the free circulation of the bill, would be deemed "unreasonable in not presenting the bill to the drawer. But in the "latter case the presentment ought to be made within a very short "period."

In Bayley on Bills, Ch. 7, § 1, p. 236, 5th Ed., cited in Note 1 to Story on Bills. § 472, it is said:

"Upon a bill or note payable on demand or at sight, and given for "cash by a person who makes the profit by the money on such bills "or notes a source of livelihood, it is difficult to say what length of "time such person shall be entitled to consider unreasonable; but "upon such bills or notes, given by way of payment or paid into a "banker's, any time beyond what the common course of business "warrants would be deemed unreasonable."

In Chitty on Bills, Chap. 9, p. 381 (13th Ed.), also cited in note one last aforesaid, it is said:

"It seems that with respect to the length of time bills and notes "payable on demand may be kept in circulation, a distinction may be "taken, &c., and it has been considered that upon a bill or note pay- "able on demand, *and given for cash* by a person who makes the "profit by the money on such bills a source of his livelihood (as in "the case of country bankers issuing their notes), it is difficult to say "what length of time such person shall be entitled to consider un- "reasonable; but that upon such bills or notes given by way of pay- "ment or paid into a banker's any time beyond what the common "course of business warrants may be deemed unreasonable. * * * "It was a bill by a country banker upon his London banker, and it "did not seem unreasonable to treat such bills as not requiring imme- "mediate presentment, but as being retained by the holders for use "within a moderate time as part of the circulating medium of the "country."

In Nutting v. Burked, 48 Mich., p. 245, the question being between endorser and holder, and upon a bank draft which had been held five days (a delay sufficient to have discharged the endorser on a bill of exchange), the court held the endorser liable, saying:

"A distinction is recognized between bills drawn by private per- "sons in particular affairs and bills which are dealt in by bankers in "the sale of exchange, and the rule of diligence is much more liberal "in regard to the latter, which are very generally used as a species of "circulating medium and sold by the holders, and therefore not re- "garded as designed for immediate presentation in any strict sense."

In Montelius vs. Charles, 76 Ill. 307, it is said:

"Bills both inland and foreign having the quality of negotiability "are intended in some degree to be used as a part of the circulation "of the country, and are indispensable in the conduct of extended "commercial transactions. They afford a safe and convenient mode "of making payments of indebtedness between distant points. Bank- "ing houses that for a consideration issue such bills must be understood "to do so in accordance with the known custom of the country that "they will be put in circulation for a limited period. If this was not "so their value would be greatly depreciated and their utility in com- "mercial transactions be destroyed, were it understood the purchaser "of such a bill was bound to make all possible dispatch to present it "to the drawee or lose his recourse on the drawer, no prudent man "would feel safe in taking one."

The court then proceeds to define the liability of the drawer as being the guaranty of responsibility of the drawee for such reasonable time as the bill shall be kept in circulation.

See Nichols vs. Blackmore, 27 Tex. 586, where delay of 47 or 48 days held not to be such laches as to relieve the drawee.

See also Jordan vs. Wheeler, 20 Tex., 698, where delay in present- ment for a month, held to be in accordance with usage.

The foregoing authorities establish the great difference contended for by us between ordinary checks drawn by an individual on his banker, and such drafts as are sued on in this case. This difference is deduced from cases, mainly of bills of exchange. If in the case of a bill of exchange issued by a bank as a part of its business and for a profit, the authorities shall hold that great liberality is to be indulged upon the question of what is a reasonable time for its presentment, it must follow as a corollary from the same authorities that in case of a bank check where no delay without injury discharges the drawer, that even a much greater length in presentment would be held as reasonable.

That the defendant, a National Bank, as a part of its business and for a profit sells exchange, is known—as well from the laws governing National Banks as from the well known course of business in the commercial world and the facts proven in the case. Then the drafts sued on are subject to the decision just cited. Upon the endorsement and delivery of them by the payee LaDue to Edson, they passed at once into circulation, and Edson, the subsequent holder, was not bound to any strict presentment. (So held in Robinson vs. Ames, 20 John, 152, 153). Once in circulation, the law of reasonable time for presentment becomes one of liberality.

If delay in presentment ever matured a check or draft or opens it to equities, we hold that it could only be a delay so extraordinary as to be inconsistent with the ordinary course of business.

Morse on Banking, 1st Ed., p. 264, cited in 2 Dan. on Neg. Inst., §1634.

Can a court say that a delay of five months, or any other given time, is of so extraordinary a character as to pronounce a check overdue as a matter of law.

Is not a delay of that length consistent with many a different use for which bank drafts are purchased in the commercial world?

Suppose the case of one going away to another portion of the country to pass several months. May such person not, as has often been done by the writer of this brief, buy of his local bank several drafts on New York and take them with him to defray his expenses during the time of his absence, using one at the end of one month, a second at the end of another, and so on until all are used up. If such drafts are liable to the defense of not being presented in time, as it is certain that no one of them can be used within such time as would be deemed reasonable for their transportation to New York, they would be valueless for the purpose for which they were bought.

Can it be said that holding the drafts for several months by a person who bought them for that very purpose is so inconsistent with the ordinary course of business that such drafts have been made overdue by the delay.

A hundred cases of like kind could be supposed, where drafts have been bought for the purpose of using them only after a considerable time. The purpose or time of their use is uncommunicated to the drawer and is known only to the drawee.

Can the purpose of the purchase of such drafts be defeated by the drawee by such defense as is attempted in this case, merely on the ground of delay in presentment where no loss has been occasioned to the drawer?

If so, it must be on some other ground than that the delay is inconsistent with the use and nature of the draft, for it is consistent with the use of such instruments, and it is one of the purposes of their use, that in and by such medium a man traveling through the country makes purchases or payments at distant times, as the exigencies of his business require.

In National Newark Banking Co. vs. Second National Bank of Erie, 63 Pa., St. 406, where the drawers had failed, the court distinguish between bank drafts when considering the question of what is a reasonable time for presentation to the drawee and other instruments and says:

"As all bank notes in the present day are at par every where, the "the object in purchasing a draft was to prevent loss by theft, robbery "or accident." The opinion then proceeds upon the idea that while the time would not have been reasonable perhaps ordinarily—yet inasmuch as the question was on a bank draft, there was no unreasonable delay in presentation of the draft, and the drawer bank was liable.

It thus appears that the only safe rule to adopt as to the question of set off is that such drafts as are sued on are only due on presentment and overdue on payment refused by the drawee, and we think the court should have so held.

But even if we were wrong in the positions above taken, and the Court should hold that as between holder and drawer of such bank drafts as those sued on, the paper became overdue when not presented to the drawee within a reasonable time, the question would still be open as to whether there had been such delay in presenting the paper in suit in this case at the time it was purchased by the plaintiffs, as to have made the paper then overdue and to have justified the Court in so holding as a matter of law or otherwise.

In Laws vs. Rand (3 C. B. N. S.) 91 E. C. L. p. 447, the check sued on was a check drawn by an individual on his banker dated May 30, 1856, and presented March 16th, 1857. The Court in that case said that no time less than six years would be unreasonable unless some loss was occasioned by the delay. Such was the decision in a case where there was no loss from delay and the question was between holder and drawee.

In Robinson vs. Hawksford, 9 Ad. & El. N. S. (58 E. C. L.), p. 51, Patterson J., says:

"As between the drawer of a check and the holder, if presentment "is deferred to such a time that inconvenience has been sustained, the "the time may then be deemed unreasonable, but if none has resulted

"I see nothing unreasonable in a presentment, I should even say, at "any time within six years."

In Sanford v. Mickles, et. al. 4, John. 225, a note payable on demand, endorsed by the payee five months after its date, under the facts of the case was held not to be due at the time of transfer so as to admit equities being shown between the payee and the maker in a suit by the holder.

See Story on Prom. Notes § 491.

Stewart v. Smith, 17 O. S. 85 in the above connection.

In Rotschild v. Comer, 9 B. & C. 398, Lord Tenterden, said:

"It cannot be said as a matter of law that a party taking a cheque "at any fixed time from its date does so at his peril."

And in the same case Littledale J. says:

"It has been urged as a matter of law that a party taking a cheque "overdue has it with the same title and no other, as the person from "whom he receives it. But although the law is so with respect to bills "of exchange and promissory notes, I think it cannot be applied to "bank cheques."

In Mullick vs. Radakisser, 28 E. L. and Eq. 28, the endorsee kept a bill of exchange five months, and it was held no laches in forwarding the same.

In Chartered Bank of India, supr., ten months was held not unreasonable.

VI.

Under the 6th point of our brief, we cite cases showing how slow courts are to give any construction to statutes or make any decisions, which shall impair the usefulness of any instrument which enters into the circulating medium of the country as such. We do not care to enlarge here upon our brief on the subject.

VII.

Under the 7th point of our brief, we seek to show why the decisions of courts on promissory notes payable on demand, do not apply to bank drafts. We do not care to enlarge on our brief on that point.

VIII.

1.

The ideas involved in two cases cited on the 8th point of our brief, suggest that the drawer ought to be estopped from doing anything to impair his draft in the hand of any holder of it. The reasonableness of this view is apparent, and in its reasonableness appears another ground for holding that under the facts of this case, the drafts sued on were not overdue till presentment to the drawee.

2.

Again it is held by some courts, that the drawer of a check makes an absolute appropriation, by the issue thereof, of so much money of his in the hands of the drawee.

Parsons on Merc, Law. p. 90.

First Nat. Bank of Cincinnati vs. Coates, 8 Fed. Rep., 542.

In this view is to be found a further reason for not allowing the drawer to defeat his own draft in the hands of a subsequent holder thereof. The drawee does not pay the money thus assigned. The drawer has the benefit of the fund thus assigned. May he keep that money and also defeat the holder when sued upon the same draft? The unjustice of so holding is apparent.

IX.

The case of LaDue vs. First National Bank of Kasson, 31 Minn., 36, was before Mr. Justice Miller, on hearing of the motion for new trial. It seems to hold against the position we contend for. As the question is one of general importance —a commmercial question—the decision last cited does not govern here.

The judgment rendered by the Circuit Court below should be reversed; and the question certified to this Court should have been answered in accordance with the view of the District Judge and not as done by the Circuit Judge.

WM. McFADON,
Attorney for Plaintiffs in Error.

123-105

123-105

Office Supreme Court U. S.
FILED.
APR 26 1887
JAMES. H. McKENNEY.
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

Lorenzo Bull, et al., against the First National Bank of Kasson, Minnesota, et al.

Writ of Error to the U. S. Circuit Court for the District of Minnesota.

The action was brought upon two Drafts of $500 each, drawn by the Defendant Bank October 15th, 1881, on the Ninth National Bank of New York, payable to the order of Defendant La Due.

On the same day La Due endorsed the two Drafts to M. Edison, who that night absconded with the Drafts, leaving numerous debts to the Kasson Bank and to others unpaid.

Edison held these Drafts, concealing himself and them from his creditors, until March 24, 1882, when he sold these two Drafts to the Plaintiffs at Quincy, Illinois, who sent them forward for payment.

Within a few days after M. Edison so absconded, the Defendant Bank learned the fact, and that La Due had endorsed and sold to him these and other Drafts. and that Edison was insolvent and a fugitive from his creditors, and had no property in Minnesota.

The Defendant Bank first learned that Edison had sold these Drafts on March 29, 1882.

On and prior to December 1, 1881, the Defendant Bank

owned and held past due the five several notes made by Edison, as set forth in the answer, viz.:

		DATE.	DUE.	AMT.
1st,	$200,	Oct. 5, 1881.	Oct. 18, 1881,	$223 00
2d,	100,	Feb. 15, 1881.	Oct. 18, 1881,	111 60
3d,	170,	Oct. 27, 1880.	Oct. 30, 1881,	189 12
4th,	145,	Aug. 1, 1881.	Nov. 4, 1881,	158 80
5th,	550,	Sept. 7, 1874.	Past due,	693 50
				$1,376 02

The question presented by this case is whether the Defendant Bank has the right to set off its said notes against these two Drafts. And this involves the question whether the Plaintiffs bought the Drafts before due.

I.

But the Defendant before proceeding to the merits, respectfully submits here, as he did in the Circuit Court, (*Record, pp. 21-22*), that the U. S. Circuit Court had no jurisdiction to hear or decide this action, for the reason that the two Drafts are by their terms, payable in "current funds," and are not promissory notes negotiable by the law merchant, or bills of exchange. A. La Due, the payee and assignor, was and is a citizen of Minnesota, as well as the Defendant Bank.

This action was commenced in the Circuit Court on August 4th, A. D., 1882, by filing the complaint on that day in the office of the clerk.

The complaint states that both the First National Bank of Kasson and A. La Due, the payee in each Draft, were then, (August 4, 1882), and for more than a year then last

past, had been citizens and residents of the State of Minnesota, and that both said instruments were made and delivered within that year, to-wit, on October 15th, A. D., 1881, at Kasson, Minnesota. That La Due endorsed, sold and transferred the Drafts to M. Edison. His residence is not stated. Edison sold, endorsed and transferred the Drafts to the Plaintiffs, who were citizens and residents of the State of Illinois.

By the Act of July 12th, A. D., 1882, to enable National Banking Associations to extend their corporate existence and for other purposes, U. S. Stat. at Large, Vol. 22, page 163, chapter 290, section four (§ 4), it is provided that the jurisdiction for suits thereafter brought by or against National Banks shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States. This provision repealed the tenth (10th) clause of § 629 of U. S. Rev. Stat.

National Bank of Jefferson vs. Fore, 25 Federal Reporter, 209.

The jurisdiction must be grounded on the Act of 1875, Vol. 18, Stat. at Large, page 470, chapter 137, § 1. If the instruments sued on are not promissory notes, negotiable by the law merchant or Bills of Exchange, then the Circuit Court had not jurisdiction.

An instrument to be a Bill of Exchange must be payable in money, in such coin or national currency as is by law a legal tender in the payment of debts.

These two instruments would have been perfect inland Bills of Exchange if the words "in current funds" had been omitted. These words having been inserted *ex industria* must have construction and office in the instruments. The Drawer thereby intended to limit or alter the meaning and intent of the instruments.

The word "Funds" is more comprehensive than the word "money". It includes securities and resources from which ready money may be realized by sale or negotiation,

and Current Funds are those securities which are current and used as money in the business of the place of payment, as National Bank Notes.

If the Ninth National Bank of New York on presentation of these Drafts had tendered in payment the current bills of solvent National Banks, it would have performed the contract, and the Drafts could not have been protested for non payment. Not being payable in money they were not bills of exchange, and the Circuit Court had not jurisdiction of this action.

A Bill of Exchange payable in Bank of England notes was held not negotiable. *Ex parte Imeon, 2 Rose, 225, Byles on Bills, * 92.* But those notes were made legal tender by Statute in 1833. *3 & 4 William IV, ch. 98, § 6.*

In *Irvine vs. Lowry, 14 Peters, 293*, the instrument was as follows:

$53.000. WARREN, Pa., 6 September, 37.

Three months after date I promise to pay to the order of Guy C. Irvine Esq., fifty-three thousand dollars in the office notes of the Lumberman's Bank at Warren, and payable at their banking house in Warren, Pa.

N. A. LOWRY.

Endorsed on side, Guy C. Irvine.

This Court in that case said:

The paper on which the suit is brought is not negotiable by the usage or custom of merchants; it is payable to order; the promise is to pay so many dollars, but not to pay any certain sum of money; it is a promise to pay the amount in the office notes of the Lumberman's Bank at Warren, which are not money, and at most a chattel. Not being a promissory note, either by the law merchant, the statute of Anne, or the kindred act of the assembly of Pennsylvania, it is not negotiable by endorsement.

In *Fry vs. Rousseau, 3 McLean C. C., 106*, a promissory note payable in current bank notes, receivable at the counter of the Bank of Michigan, in Detroit, was held not negotiable, and as there was no allegation that the original

promissee, Williard, was an alien or citizen of another State, the jurisdiction of the Circuit Court was denied.

In *Hasbrook vs. Palmer, 2 McLean, 10*, it was held that a note "payable in New York funds or their equivalent" was not negotiable. Most of the cases prior to 1839 are there cited.

In *Jones vs. Fales, 3 Mass., 245*, this matter was much considered. The note there in suit was as follows:

$680. BOSTON, 21 Oct., 1806.

Value received, I promise to pay Mr. Stephen Fales or order, in sixty days and grace, six hundred and eighty dollars.

(Foreign bills.) WM. CLAP.

A question was made as to its negotiability on account of the words "*foreign bills*" being written as above.

Parsons, Ch. J., for the Court said:

If they are words of the promisor, they must be considered either as idle words, or as a part of the promise to which he gave his signature; or as a subsequent memorandum explanatory of the manner in which the promise was to be performed. I am not authorized to consider them as words without meaning; and I do not think it material, whether they were part of the original contract, or added in explanation of it. For when the promisee took the note with these words on it, he was subject to the explanation in the memorandum, if it was one, as much as he would be bound by these words, if they were a part of the promise. The words may secure a benefit to the promisor, and I consider him as stipulating that the money might be paid in foreign bills; and I consider the promisee, by taking the note thus written, as agreeing to the stipulation. And I can have no doubt, if, on the day of payment, the promisor had tendered to the promisee foreign bills in payment, and they had been refused, that this tender and refusal might have been well pleaded to a subsequent action upon the note.

It is, therefore, my opinion that the note was not, in its original creation, a note for the absolute payment of cash, and so was not negotiable.

The claim that these Drafts are not negotiable and therefore not bills of exchange within the language of the

Act of 1875, is sustained by the following cases among numerous others.

Texas Land & Cattle Co., vs. Carroll, 63 Texas, 48.
Haddock vs. Woods, 46 Iowa, 435.
Conwell vs. Pumphrey, 9 Indiana, 136.
Lindsey vs. McClelland. 18 Wis., 481.
McCormick vs. Trotter, 10 S. & R., (Pa.) 94.
Little vs. Phoenix Bank, 2 Hill, (N. Y.) 425.

Chief Justice Dixon in *Platt vs. The Sauk Co. Bank, 17 Wis., 226,* says:—The words "current funds" were undoubtedly intended to include all funds bankable in this State, and any such funds would answer the description and satisfy the contract. A tender in any of the notes of the banks of this State passing as currency would have discharged the obligation.

In some of the Western States they have refined very acutely upon the expressions in bills and notes, stating the medium of payment. Some criticism on their decisions may be found and profitably examined in *1 Am. Leading cases. * 314.*

1 Daniel Neg. Inst., § § 55 to 58, incl.

II.

Set-off.

By the English commercial law no set-off was allowed in actions upon negotiable paper. Although in dispute this seems to be the better rule also in this country, except where altered by Statute. The rule that a party taking an overdue bill or note, takes it subject to the equities to which the transferrer is subject, does not extend so far in the ab-

sence of Statute as to admit set-offs which might be available against the transferrer.

Burrough vs. Moss, 10 B. & C., 558.
Whitehead vs. Walker, 10 Mees. & W., 696.
Oulds vs. Harrison, 28 Eng. L. & E., 524.
2 Daniel Neg. Inst., § § 1435 to 1437 incl.

But in Minnesota where this case arose and where this action was tried, Statutes have been enacted setting the question at rest. There in an action arising on contract, Defendant may set-off any other cause of action arising also on contract and existing at the commencement of the action. *Minnesota Genl. Stat. of 1878, chapter 66, § 97, second.*

The other Minnesota Statutes referred to are as follows: *Genl. Stat., chapter 65, § 40.*

If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the Plaintiff after it becomes due, a set-off to the amount of the Plaintiff's demand may be made of a demand existing against any person who has assigned or transferred such note or bill after it became due, if the demand is such as might have been set-off against the assignor while the note or bill belonged to him.

"Chap. 66, § 27. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due."

In *Linn v. Rugg, 19 Minn. R., 181,* the State Supreme Court say:

"The object of this Statute was to enlarge the rule of set-off, and to enable the Defendant to set up any claim against the original party which arose out of the subject matter of the action or was acquired by Defendant while the chose in action was in the possession of the original party, or before Defendant had notice that he had assigned it for a valuable consideration. So long as Defendant had no notice

that the original party has parted with the chose in action, he might in good faith acquire any claim within the Statute against such party, and it would seem but just and equitable that he be permitted to set the same up as a defense in an action by the latter."

Martin v. Pillsbury, 23 Minn. R., 175.

Daniel on Neg. Inst., § 1437.

Bond v. Fitzpatrick, 4 Gray. 89, 92.

The Federal Circuit Courts follow the rule as established in the State where the action is brought.

In *Patridge vs. The Insurance Co., 15 Wall., 573-580,* Mr. Justice Miller, speaking for the court, said:

"That Defendants in the Circuit Court of the United States can avail themselves of the laws which prevail in the State concerning the right of set off generally. It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held, and escape the liability which the laws of the State have attached to all Plaintiffs of allowing just and legal set-off and counter-claims to be interposed and tried in the same suit and in the same form."

U. S. Rev. St., § 914.

The Federal Circuit Court for the District of Minnesota held that the Bank had the right to make the set-off, when sued upon these drafts..

Bull vs. Bank, 14 Fed. Rep., 612.

The Supreme Court of Minnesota also held, in a suit upon another of this series of Drafts, that the set-off must be allowed.

La Due vs. Kasson Bank, 31 Minn., 33

III.

There remains the question whether these Drafts were past due when Edison transferred them to the Plaintiffs in

Error. They were issued to La Due, and by him transferred to M. Edison on October 15th, 1881. Edison held them until March 24th, 1882, when he endorsed and sold them to the Plaintiffs in Error. He held them over five months. No explanation is given why Edison held these Drafts so long without presenting them for payment, nor does it appear that Plaintiffs asked for any explanation of this fact when they purchased them.

The Draft is not past due until a reasonable time has elapsed in which to present it for payment in the due course of business. In Minnesota where these Drafts were made, and where this action was tried, a statute has been enacted providing that a reasonable time does not extend beyond sixty (60) days from the date it is put in circulation. It is as follows:

Minn. Genl. Stat. of ~~1867~~ 1878, chapter 23, § 11.

"Upon a promissory note payable on demand, a demand made at the expiration of sixty days from the date thereof without grace, or at any time within that term, shall be deemed to be made within a reasonable time; and any act, neglect, or other things, which, by the rules of law and the customs of merchants, is deemed equivalent to a presentment and demand on a note payable at a fixed time, or which would dispense with such presentment and demand, if it occurs at or within said term of sixty days, shall be deemed a dishonor thereof, and shall authorize the holder of such note to give notice of the dishonor to the endorser as upon a presentment to the promisor, and his refusal or neglect to pay the same. No presentment of such note to the promisor and demand of payment shall charge the endorser, unless made on or before the last day of saidte rm of sixty days."

This statute was copied substantially from Massachusetts. See *Mass. Pub. Stat. of 1882, chapter 77, § 12,* mentioned in *Rice vs. Wesson, 11 Metcalf, 400.*

In the following cases the delay without a statutory rule was held fatal:

14 days: *Walsh vs. Dart, ~~53~~ 23 Wis., 334.*

21 days: *Phœnix Ins. Co. vs. Gray, 13 Mich., 191.*

5 months: *Sice vs. Cunningham, 1 Cow., 397.*
1 year: *Hart vs. Eastman, 7 Minn., 74.*
11 days was in time: *Nat. Newark Bank, 63 Pa., 404.*

By their terms, these bills were payable on demand, without grace.

1 Daniel, Neg. Inst. § 617, note 6.

If the bills were not presented in a reasonable time for payment, so as to charge the endorser, then under the same circumstances, set-off against the dilatory holder can be maintained as against his transferree. That is, if Edison held the drafts so long as to discharge the endorser, La Due, then the defendant bank can make the set-off it desires in this action.

1 Daniel, Neg. Inst. § 611.

Bills payable at sight or in a given number of days after sight, are supposed by the law merchant to be intended for circulation, and are entitled to grace, and the time for presentation is quite different from the rule applicable to the Drafts in suit.

1 Daniel on Neg. Inst. §§ 617, 467, 418, 469.

These Drafts being payable on demand, should have been presented in a reasonable time. If not so presented, they are deemed overdue in Edison's hands, and subject to all existing equities and set-off; and the plaintiffs his assignees, took them knowing this, and cannot thereby injure the Defendant Bank, or deprive it of its right of set-off. It would be a gross injustice to the Defendant Bank to so decide.

Herrick vs. Wolverton, 41 N. Y., 581.

1 Daniel Neg. Inst. § 611.

As there was at common law no set-off to commercial paper in any case, there are no authorities on the subject in the books, and bankers and commercial men bred to business

under the rules of English commercial law, do not readily admit the correctness of the rule here contended for.

A bill of exchange is the instrument by which the payee transmits his funds to a distant creditor. Its sole purpose in such transmission, and the parties to it, when it is drawn, contemplate a speedy mailing of it to the endorsee, and that such endorsee will collect the bill of the drawee by due course of mail and business. The parties all contemplate that no one will hold the bill more than one day.

This being the expectation of the drawee when he sells the bill, he only undertakes to have an agent or correspondent at the place of payment with funds for a reasonable length of time thereafter. He does not agree to maintain an agent and hold funds at the distant place of payment forever. There must come a time when the drawer's obligation to employ an agent and entrust him with funds at the place of payment, will end. It must end if the bill be not presented for payment within the time reasonably contemplated by the drawer and payee at the time it was made, having regard to the object of such bills and the usual course of business. It was not contemplated by the drawer and payee that these bills should be held as certificates of deposit with the drawee. They were past due when a reasonable time for presentation had elapsed. As they remained unaccepted, the drawer was the debtor, and had the right of set-off under the Minnesota Statutes.

The drawer's contract was that, if not paid by drawee, he will pay it at the place where it was drawn.

16 Am. Law ~~Rep.~~ Review, 501, 506, 510.

The case at bar presents no question under the law of commercial paper. It is entirely governed by the Minnesota Statutes above set out. The construction which has been placed upon those Statutes by the Supreme Court of that State, will be accepted in this Court as the correct one. A copy of that opinion is attached hereto. It will be found also in *31 Minn., R., 33.*

IV.

It is submitted that the certificate of division of opinion does not state or set forth a question of law, but a mixed question of both law and fact, proper to be submitted to a jury with proper instructions as to the law. The distance between the place where drawn and the place of payment, the means of communication between the two places, the number of hands through which the Bill passed, the course of business between the parties, all come in to aid the determination, and they are all questions of fact. They were properly decided by the Circuit Judge as a jury had been duly waived, but they can not properly be reviewed in this Court upon a certificate of division of opinion. *U. S. Rev. Stat., § § 652, 693.*

Williamsport Bank, vs. Knapp, 119 U. S., 369.

In the case last cited this court says:

Under the acts of Congress, authorizing questions arising on a trial or hearing before two judges in the Circuit Court, and upon which they are divided in opinion, to be certified to this court for decision, it has always been held that each question certified must be one of law, and not of fact, nor of mixed law and fact, and that it must be a distinct point or proposition, clearly stated, and not the whole case, nor the question whether upon the evidence the judgment should be for one party or for the other. *Saunders vs. Gould, 4 Pet., 392; United States vs. Bailey. 9 Pet., 267; Weeth vs. New England Mortgage Co., 106 U. S. 605; California Paving Co., vs. Molitor, 113 U. S. 609, 615-617; Waterville v. Van Slyke, 116 U. S. 699-704.*

Mr. Daniel in his work on Negotiable Instruments, in speaking of this question as to a reasonable time within which demand of payment should be made, says:

Many of the authorities hold that the question of reasonable time is for the jury to determine as a matter of fact, while others maintain that it is matter of law for the Court; but neither is strictly correct. It is a mixed question of law and fact, in most cases to be determined upon hypo-

thetical instructions of the Court, like all other contested matters.

1 Daniel Neg. Inst., § *612.*

CHAS. C. WILLSON,
Counsel for Deft. in Error,
Rochester, Minnesota.

La Due vs. First National Bank of Kasson, 31 Minn., 33.
Opinion of the Court.

MITCHELL, J. At Kasson, Minnesota, on the 15th of October, 1881, the defendant drew its draft or bill of exchange for $500 on the Ninth National Bank of New York, payable on demand, to the order of plaintiff, and, for value, delivered the same to the payee, who, on the same day, indorsed it to one Edison, who held it until the 8th of March, 1882, without presentation for payment, and, on the day last named, indorsed it to one Jordan, who on the 11th of the same month, indorsed it to the Exchange Bank of Louisiana, Missouri, which caused it to be presented for payment on the 15th of the month, when payment was refused, and the draft protested. On the 4th of April, the Exchange Bank transferred it to plaintiff. No explanation is given why Edison held the draft so long without presenting it for payment, nor does it appear that either Jordan or any of the subsequent indorsees asked for any explanation of this fact when they purchased it. In October, 1881, immediately after the draft in question had been transferred to him, Edison absconded from the state, leaving debts unpaid, among which was a promissory note for $500 and interest, dated September 26, 1881, payable in 30 days to the order of defendant bank, and which it then held and still holds, and which has never been paid. About the first of November, 1881, the defendant having ascertained that Edison was the owner of the draft in question, notified the drawee not to pay it. This last fact is, perhaps, not material. Upon being sued upon the draft, the defendant now seeks to set off against it the promissory note against Edison already referred to, and the only question in the case is whether, under the facts stated, this can be done. It may be here remarked that La Due, the payee, was clearly discharged from liability as indorser, by the delay of five months in presenting the draft for payment; hence, he can claim no rights as an indorser who has been compelled to pay. His purchase of the draft from the Exchange Bank was a purely volun-

tary act, and he has now no greater rights under it than if he had never before been a party to the instrument.

According to the commercial law in England, and in probably all those states where a different rule has not been fixed by statute, an indorsee of an overdue bill or negotiable note takes it subject only to such equities or defences as attached to the bill or note itself, and not to claims arising out of collateral matters or independent transactions, whether they arose against the payee or an intermediate holder; the idea being that such commercial paper, although overdue, did not lose its negotiability. Our state, following the example of many others, has by statute entirely changed this rule. Gen. St. 1878, *c.* 66, § 27, provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration before due." The effect of this statute, clearly, is to place an overdue bill or note upon the same footing as any other chose in action, and, if it be assigned after due, a set-off to the amount of the note or draft may be made of any demand existing against any person who has assigned or transferred such note or bill after it became due, if the demand is such as might have been set off against the assignor while the note or bill belonged to him. A set-off arising out of an independent transaction against an intermediate holder is thus placed upon the same footing as an equity attaching to the bill or note itself against the original payee. This same rule is laid down, in somewhat different language, in the provision regarding set-off in justice's court. Gen. St. 1878, *c.* 65, § 40. To illustrate, suppose Edison had been the payee, and had obtained the draft by fraud and without consideration, or had received payment on it while he owned it, but by oversight or mistake it remained in his hands. These would have been defences attached to the draft itself, as between the original parties, and, if the draft was overdue when Edison indorsed it to Jordan, defendant could have set them up even under the former rule against the draft in the hands of Jordan, or those to whom he subsequently transferred it. But now, under the statute, defendant could set-off this note, although it arises out of an independent matter, against an intermediate holder, because it is a demand which might have been set-off against Edison while the draft belonged to him, had he sued on it. *Linn v. Rugg*, 19 Minn. 145, (181;) *Martin v. Pillsbury*, 23 Minn. 175; *Harris v. Burwell*, 65 N. C. 584.

Such a rule may render precarious the business of dealing in overdue paper, especially when it has passed after maturity through the hands of several holders. The policy of such a law is exclusively for the legislature, but we may suggest that we see no reason why overdue commercial paper should not be placed on the same footing as any other chose in action. Notes and bills of exchange are only treated as business paper when negotiated before maturity. When overdue they are dishonored. In the principal commercial states of the Union, such as New York, this same rule has long been established by statute. Hence, our state cannot be charged with having adopted a rule in opposition to the judgment or usages of the business world.

The only question left, then, is whether this draft was "overdue" when Edison indorsed it to Jordan on the 8th of March, 1882, four months and twenty-three days after its date.

In the case of a bill, note, or check, payable on demand, no exact day of payment is fixed in the instrument. The general rule is that it must be presented for payment within a reasonable time, having in view ordinary business usages, and the purposes which paper of that class is intended to subserve.

The term "overdue," as applied to a demand bill of exchange, is used in different connections, in each of which it has a different meaning; and the failure to keep these distinctions in mind has perhaps led to some misapprehension regarding the present case. Sometimes it is used in reference to a right of action against a drawer or indorser. In that connection a bill is not overdue until presented to the drawee for payment, and payment refused. Sometimes the term is used in considering whether an indorser has been released by a failure of the holder to present the bill for payment, and to give the indorser notice of its dishonor within a reasonable time. Again, the term is applied to a bill which has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defences which the drawer had against it in the hands of the assignor. It is in this last connection that the term "overdue" is considered in the present case. That in this case a bill may be said to be overdue, although it has never been in fact presented to the drawee for payment, is recognized everywhere throughout the books, and will be apparent. we think, on a moment's reflection. Suppose a draft has been held by the payee five years, without ever having been presented to the drawee for

payment, and is then indorsed to another party. It would not be due so as to give a right of action against the drawer, because his contract is only to pay in case it is not paid by the drawee on presentation. But there would be no doubt that it would be overdue or dishonored, so as to charge it in the hands of the indorsee with any defences which the drawer had against it in the hands of the payee, although, when he took it, it had never been presented for payment. The retention of a demand draft so long a time without presentment, when no defence exists against it, is so unusual and contrary to business usages that this circumstance would be held to charge the indorsee with notice when he purchased the draft that it was dishonored. The lapse of time would in such case be so great as to put a purchaser upon inquiry as to the reason why it was still outstanding and unpaid.

The cases are almost innumerable in which it has been held that paper payable on demand had been outstanding so long when transferred, as to be deemed overdue and dishonored, so as to subject it, in the hands of the purchaser, to any defences which the maker or drawer had against it in the hands of the payee; and in none of these cases is the question whether or not the paper had been, before the transfer, presented for payment to the maker or drawee, referred to as at all material. *Down v. Halling*, 4 B. & C. 330; *First Nat. Bank v. Needham*, 29 Iowa, 249; *Cowing v. Altman*, 71 N. Y. 435; *Sylvester v. Crapo*, 15 Pick. 92; *Ranger v. Carvey*, 1 Met. 369; *Herrick v. Wolverton*, 41 N. Y. 581; Story on Prom. Notes, § 207 and note; *Thompson v. Hale*, 6 Pick. 258; *American Bank v. Jenness*, 2 Met. 288; *Carlton v. Bailey*, 27 N. H. 230; *Parker v. Tuttle*, 44 Me. 459; *Nevins v. Townsend*, 6 Conn. 5; *Camp v. Scott*, 14 Vt. 387; *Morey v. Wakefield*, 41 Vt. 24.

That in determining whether an indorsee took a demand note or bill as dishonored and overdue paper, subject to all equities or defences, the test is the length of time it has been outstanding, and not whether it has in fact been presented for payment, may be illustrated in another way. Suppose a draft had in fact been presented for payment, and payment refused, on the very day it was issued, it would then be overdue as to the drawer, so that an action would then lie against him. But suppose, immediately after such presentation, and on the same day, the holder should indorse the draft to another, who took it in good faith, for value, without notice of this actual dishonor; clearly such indorsee would not take it as overdue paper, subject to the equities or defences against it in the hands of the former holder, be-

cause, a reasonable time for its presentation not having expired, there was nothing to put him upon inquiry, or to charge him with notice of such equities. *Himmelman v. Hotaling*, 40 Cal. 111 In fact, in determining whether an indorsee takes such paper as overdue paper, subject to such defences or equities, the question of actual demand and dishonor does not enter into the discussion. The point of inquiry is, had the paper been outstanding so long after its date as to put the purchaser upon inquiry, and charge him with notice that there is some defence to it? In view of the well-known fact that bills of exchange are not always transmitted immediately for payment, but first pass through the hands of several intermediate holders in the ordinary course of business, and in other cases are purchased by travellers to be carried with them instead of currency or coin, to be negotiated as occasion may require, we are not disposed to lay down any narrow rule on this subject. But in this case we think that the fact that this draft was, without any explanation of the reason, found outstanding nearly five months after its date, fully justified the trial court in holding it overdue and dishonored when Jordan took it, so as to charge it in his hands, or the hands of those who hold under him, with any defence or set-off which the drawer had against it in the hands of Edison.

Order affirmed.

123-105

Office Supreme Court U. S.
FILED.
APR 28 1887
JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

LORENZO BULL, CHARLES H. BULL, and EDWARD J. PARKER, partners as L. & C. H. BULL,
Plaintiffs in Error,
vs.
THE FIRST NATIONAL BANK OF KASSON.

No. 284.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

WM. McFADON, Attorney for Plaintiffs in Error.

WOLF, JONES & MC MEIN, PRINTERS, QUINCY.

REPLY BRIEF.

I.

The judges below having decided in favor of the jurisdiction of the United States Circuit Court, and not having divided on that point, the jurisdictional question raised by brief of defendant in error is not open for the consideration of the Supreme Court of the United States at this time. The single point on which the judges divided is alone brought up to this court by the certificate.

Ward vs. Chamberlain, 2 Black. 430.

Ogle vs. Lee, 2 Cranch. 33.

Kennedy et. al., vs. Georgia Bank, 8 How. 617.

II.

But even if the question of jurisdiction were open for the consideration of this court—the words current funds added to a draft do by the laws of Minnesota, where the suit was brought and where the drafts sued on were issued—leave them negotiable.

Butler vs. Paine, 8 Minn., 284.

The same is true of the laws of New York, the place of payment.

Pardee vs. Fish, 60 N. Y., 286, and cases cited.

Then whether negotiability of the drafts be determined by the law of the place of issue.

Story, on Conflict of Laws, Secs. 354, 355, 357, 316, 317.

Or by the place of payment these drafts were negotiable.

The words "current funds" are equivalent to current money and do not destroy the negotiability of the instrument.

Laird vs. State, 61 Md., 360.

Klauber et al. vs. Biggerstaff, 47 Wis., 560.

Overruling Platt vs. Bank, 17 Wis., 296.

Howe vs. Hartness, Hill & Co., 11 O. S., 449.

1 Danl on Neg. Instruments, Sec. 56, and many cases cited.

III.

By the certificate of division, is presented a single question of law for the decision of the court. There is no mixed question of law and fact arising upon the certificate.

The single question of law presented is this: Does the law of overdue papers apply to the instruments sued on. In other words are the instruments sued on bank checks and governed by the law of bank checks, or are they not?

If the question be answered that the law of overdue papers does not apply to them, or that the instruments sued on are bank checks, these legal consequences follow, viz.:

1stly. They were not due till presented for payment to the drawee.

Merchants Bank vs. State Bank, 10 Wall 647.

2ndly. They were not due when purchased by plaintiff in error, because bought by them before presentation to the drawee.

3rdly. The law of overdue paper is not consequently applicable to the instruments sued on.

4thly. The drafts were not due when bought by plaintiffs in error so as to admit the set off, allowed by the court below, and the question raised on the certificate was answered wrong by the court below.

The question presented by the certificate is single and one of law.

On the motion for a new trial, it was answered by the Justice Miller, that the law of over due paper did not apply to the instruments sued on.

The question can be answered by this court in the same manner, and if so answered, the erroneous decision of the lower Court appears.

FINALLY.

The question now before the Court, was certified up in accordance with a suggestion in the opinion of Mr. Justice Miller, in granting a new trial below. (R. 21.)

WM. McFADON,
Attorney for Plaintiffs in Error.